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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

vs.

R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

PETITION FOR CERTIORARI FILED MAY 25, 1929

CERTIORARI GRANTED JUNE 3, 1929

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( )

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[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON**

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Plaintiff-in-Error,

v.

R. L. BRYANT, Admr. of M. L. BRYANT, Dec'd,

Defendant-in-Error.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME

Your petitioner, The Chesapeake & Ohio Railway Company, a corporation, respectfully represents unto the court that it is aggrieved by a certain judgment entered by the Circuit Court of Alleghany County on April 28th, 1927, in an action at law then therein pending wherein the petitioner was defendant and R. L. Bryant, Administrator of M. L. Bryant, dec'd, was plaintiff, which said judgment was for the sum of $8,000., with interest from its date, and the costs.

A duly certified transcript of the record of said action at law is herewith exhibited.

Statement of the Case

In this petition the defendant in error, R. L. Bryant, Administrator of M. L. Bryant, dec'd, will be referred to as the plaintiff, and your petitioner, the plaintiff in error, as the defendant. All references to the record are to marginal paging.

For some years prior to August 31st, 1925, the plaintiff's intestate, M. L. Bryant, and one C. P. Dodson had been working together as section hands on the defendant's railroad in Alleghany County. On the day mentioned Dodson shot and killed Bryant.

[fol. 2] The plaintiff instituted his action of trespass on the case against the defendant, his declaration alleging that

the relation of master and servant existed between the intestate and the defendant, and, in its first count, that Dodson, the defendant's section foreman, discharged Bryant from the defendant's employment and that then, acting as the defendant's servant and in the course of his employment, had shot and killed Bryant; in its second count, that the defendant employed Dodson, an unfit and dangerous person, who, in the course of his employment and within the scope of his authority killed the intestate.

Bryant and Dodson for some years had been employed by the defendant as section laborers under its section foreman, Long, working near Backbone in Alleghany County. On Thursday, August 27th, Foreman Long was called away because of his mother's illness and death, and with the consent of his superior placed Dodson in charge of the work then being done and the force of hands doing it (Rec., p. 204). This work was, changing the tracks of the main line, putting in new ties and surfacing (Rec., p. 202). The defendant was engaged in, and Bryant was employed in interstate commerce.

The circumstances of the shooting were proved by the plaintiff's witnesses as follows:

On the morning of Monday, August 31st, 1925, the section gang had placed their lever car on the track and were loading it with their tools to continue the work being done at quitting time on the previous Saturday. Bryant came with his dinner bucket, which he put down by the lever car. Dodson was in charge of the force.

Dodson then said, "Bryant, I can't work you any longer" (Thompson, Rec., p. 83). Bryant either did not hear him or paid no attention, but went to the tool house, which was alongside, got his pick and brought it to the car upon which he placed it and his dinner bucket (Frank Wright, Rec., p. 59). Dodson repeated, "I told you I couldn't work you any longer" (Thompson, Rec., p. 83). Bryant replied, "I will give you (Dodson) what is coming to you this morning" (Frank Wright, Rec., pp. 66, 68). Dodson said, "I told you to go on away from here," and drew a pistol (Rec., pp. 66, 67). At that, Bryant said, "What are you going to do with that thing" (Thompson, (Rec., p. 76), "I will make you eat that" (S. J. Wright, Rec., p. 52, Frank Wright, Rec., p. 68, Pierce, Rec., p. 92). Thereupon Dodson fired his pistol and Bryant was mortally wounded,

dying some days afterwards. The plaintiff's witnesses differed somewhat in their recollection of the words used by [fol. 3] Dodson; Frank Wright recollected them as, "I aint got anything more for you to do" (Rec., pp. 59, 65), S. J. Wright, "Fellow, I don't need you any longer" (Rec., p. 40), McDowell, "I aint going to work you any more," to which Bryant replied, "Why, what is that for" (Rec., pp. 134-5).

On his way to his work that morning Bryant had stopped at E. C. Thompson's house, talked with Thompson and as he left said, "Well, I will go on down. I guess Dodson will fire me this morning," and that he, Bryant, had told Dodson, "If he didn't quit talking about him that one or tother of us would have to take a whipping," to which Dodson had replied, "All right, I have got the difference in my pocket" (Rec., p. 161).

Dodson himself, by deposition taken at Richmond, testified for the plaintiff that on the preceding Saturday, as work was ending, Bryant said to him, "I am going to beat the hell out of you"; that he said to Bryant, "After this evening, remember I don't work you any more," and that Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 110).

The defendant's supervisor of tracks, in charge of all sections upon that division, testified that on Saturday previous to the killing he was at the work and noticing that Bryant was not working properly directed Dodson to discharge him (Rec., p. 197).

Dodson was instructed, when Foreman Long left him in charge, to go ahead with the work then being done, which would take some four or five days, changing the curve to a uniform line to certain grade stakes, and to look after the general condition of the track, surface and line over the four mile section (Rec., p. 205); he had authority to discharge men under him (Rec., p. 209). Dodson had no authority to police or guard the railroad tracks against trespassers (Rec., p. 207). The plaintiff's witnesses testified that Dodson was a high tempered and nervous man (Rec., pp. 18, 46, 79, 81, 85, 127), but no one had ever known him to have a personal difficulty. One witness, G. F. Wright, said that, "He was sick most of the time with his stomach," and that "he told me he ate oatmeal" (Rec.,

pp. 19-20), and another witness, Taylor Thompson, that Dodson seemed to be a nervous man and would get sick," that "he ate a lot of bran and had indigestion" (Rec., pp. 79-80). The plaintiff's witness, Frank Alfred, testified that Dodson was neither a profane nor a fighting man, "I never knowed him to be in no fight" (Rec., p. 153); S. J. Wright, who had worked with Dodson off and on for about [fol. 4] six months when Foreman Long was gone, had never heard of him having any difficulty with any of the men (Rec., p. 181); E. C. Thompson, that Dodson never had a fight or difficulty with any man while he was there, that the witness never heard of Dodson striking anybody, and never saw him striking anybody, that Dodson was not a fighter and never had any fight or anything like that (Rec., p. 185); McDowell, over a period of two years while he worked with him, had never heard of Dodson having any personal difficulty and had never seen him have a fight with any person. Supervisor of Tracks Crance and Foreman Long, Dodson's superiors, testified for the defendant that he was a competent man of good character, handled men well and got along well with his work. No one had ever complained of Dodson to either witness (Rec., pp. 203, 204, 192, 195).

The defendant proved that it was an interstate carrier engaged in interstate commerce; that the work then being done was on its interstate line (Rec., pp. 192-3, 53, 109); this evidence being introduced in support of the defendant's special plea (Rec., p. 4), and its effect being that the case is governed exclusively by the federal employer's liability act.

In addition to the special plea referred to there was a plea of not guilty.

The defendant demurred to the evidence, the jury assesed damages at $8,000., the Circuit Court overruled the demurrer and entered the judgment complained of. The grounds of the demurrer to the evidence are shown at pp. 299-230 of the record.

Assignment of Error

The Circuit Court erred in overruling the defendant's demurrer to the evidence for the reasons:

First. The defendant cannot be held liable under the Federal Employer's Liability Act, which applies here to the

exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees (Fifth Ground of Demurrer, Rec., p. 229).

Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate (Third and Fourth Grounds of Demurrer, Rec., p. 229).

[fol. 5] Argument

First. The demurrer to the evidence should have been sustained for the reason that the defendant cannot be held liable under the Federal Employer's Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees.

1. The defendant proved that it was an interstate carrier engaged in interstate commerce, and that the work done on Saturday previous to the shooting and to be done on the day of the shooting was in the maintenance and improvement of its main line (Rec., pp. 192-3, 53, 109). The defendant's section force, therefore, including the plaintiff's intestate, was employed in interstate commerce.

New York Central R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045;

New York Central R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536;

Kingell v. C. & St. P. R. Co., 250 U. S. 130, 63 L. ed. 893;

Pedersen v. D. L. & W. R. Co., 229 U. S. 446, 57 L. ed. 1125.

In the Winfield case, supra, the plaintiff was a section laborer assisting in the repair of the carrier's main track, and was tamping cross-ties when injured.

In the Porter case, supra, Porter was a track employee clearing snow from the railroad tracks.

In the Kingell case, supra, the plaintiff's intestate was killed while clearing the tracks of dirt dumped to make an earth fill under a trestle.

In the Pedersen case, supra, the plaintiff was carrying bolts from a shop to a bridge over which interstate commerce was carried, such bolts to be used on the next day or that night.

That the section gang had not yet actually engaged in work on the track, but had only set their lever care on the track and were loading their tools preparatory to going to the place of work, does not alter the case. The work intended to be done is interstate in character and the federal act applies, to the exclusion of any other statute or rule of law, while the employee is going to or is coming from his actual task.

C. & O. Ry. Co. v. Nixon, 140 Va. 351;
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 70 L. ed. 194;
[fol. 6] Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057;
Pedersen v. D. L. & W. R. Co., supra 229 U. S. 446, 57 L. ed. 1125;
Cudahy P. Co. v. Parramore, 263 U. S. 418, 68 L. ed. 366.
See also San Pedro, etc., v. Davide (C. C. A.), 210 Fed. 870.

In the Nixon case, supra, the plaintiff's decedent, a section foreman, was riding a velocipede on his way to his day's work on an interstate railroad.

In the Pedersen case, supra, the materials which Pedersen was carrying to the place of work were to be used that night or the next day.

In the Winfield case, supra, Winfield, in charge of a switch engine during the day handling both interstate and intrastate traffic, had taken his engine to the place where it was to remain for the night and was killed while leaving the yard. The Court said, "Like his trip through the yard to his engine in the morning, it was a necessary incident to his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate

and intrastate commerce, and so, when he was leaving the yard at the time of his injury his employment was in both. That he was employed in interstate commerce is therefore plain'' • • •

In the Parramore case, which did not involve the employer's liability act, Parramore was killed while crossing tracks across the only road going to the Cudahy Packing Company's plant, where the deceased was to begin work within a very few minutes. The Court held that he was then working for the defendant. ''The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose.''

2. Upon receiving the order of discharge Bryant was entitled to a reasonable opportunity to obey the order to quit work and must be regarded as in the service and under the federal employer's liability act during such interval of time as was reasonably required for his departure. He had not become a trespasser upon receipt of the order of discharge. He had come upon the defendant's premises as an employee and at the close of his work was entitled under the law to a reasonable opportunity to leave the premises. He had no such opportunity. ''This whole transaction happened very quickly'' (Rec., p. 83).

[fol. 7] It is unquestionable that if the order which Bryant received had been an order to quit work for the day or any other interval, he would have been treated as an employee during the reasonable interval required for him to obey the order and leave. An order to quit work permanently, a discharge, differs from an order to stop work for the day or temporarily only in its finality.

It is settled law that in leaving the carrier's premises at the close of a day's work, and in coming upon the carrier's premises to engage in work, the employee is discharging a duty of his employment and is entitled to protection as such.

Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, in which it was said (p. 173):

''In leaving the carrier's yard at the close of the day's work the deceased was but discharging a duty of his employment. See N. C. R. Co. v. Zachary, 232 U. S. 248, 58 L. ed.

591. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work." * * * "That he was employed in interstate commerce is therefore plain."

3. The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees; Dodson's act was a wilful wrong.

The federal employer's liability act makes negligence alone the basis of the duty to make compensation and there can be no recovery under the act.

The point has been directly ruled by the United States Supreme Court in the case of Davis v. Green, presently cited, and is settled.

In Davis v. Green, 260 U. S. 349, 67 L. ed. 299, the facts were these: Green, a conductor, was working on a train with McLinden, an engineer. The latter became enraged because a switchman had signalled him twice and when the switchman explained to him that he was acting under the conductor's orders the engineer said that he would kill the switchman and the conductor both. He then knocked the switchman in the head with a hammer and shortly after, meeting Conductor Green, shot and killed him. Green's administratrix brought suit in the Mississippi state court against the Director General of Railroads. It was proved that the conductor and engineer did not get along together [fol. 8] in their work; that the engineer was a contentious, disagreeable and quarrelsome man, and constantly embroiled in quarrels with his fellow employees, that he carried a pistol either in his engine or on his person; that he had been frequently reported to the Company; that he had killed a man before killing Green and that he was regarded by the employees and had the general reputation in the community of being a turbulent, dangerous and violent man. The Supreme Court of Mississippi held the Railway Company liable (87 So. 649).

The United States Supreme Court, in reversing the case held:

"Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States."

In New York C. R. Co. v. Winfield, supra, (244 U. S. 147, 61 L. ed. 1045), Winfield, employed as a section laborer, had lost an eye through one of the ordinary risks of the work in which he was engaged, and sought compensation from the defendant railroad company under the state workmen's compensation statute. In holding that the federal act was exclusive and superseded all state legislation and common law rules which might give a recovery to an employee under such circumstances, the Court said (italics inserted):

"True, *the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence,* but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier, where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle" * * * "The act plainly shows, as was expressly held in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees" * * *

[fol. 9] Again the Court said (p. 153):

"As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act" * * * "Thus, *the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability.*"

In Erie R. Co. v. Winfield, supra, (244 U. S. 170, 61 L. ed. 1057), where an effort was being made to obtain compensation under the state statute for the death of an employee, in denying the applicability of the state statute, where no negligence was alleged or proved, referring to New York C. R. Co. v. Winfield, above cited, the Court said (p. 172):

"We are of opinion that the federal act proceeds upon the principle which regards negligence as the basis of the

duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed."

See also Roebuck v. Atchison, etc., Ry. Co., 99 Kan. 544, 162 Pac. 1153, L. R. A. 1917E, 741, in which recovery under the federal employer's liability act was denied in a case where a section hand stabbed to death a section foreman after the section foreman had notified his superior that he could not work the section hand because of his quarrelsome disposition, that he was a dangerous man and that he had killed one or two men.

Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate.

The plaintiff's declaration is explicit in its averment that the plaintiff's intestate was employed by the defendant. In the first count it is declared that the intestate began his day's work for the defendant on its section, when the defendant's foreman and servant in the course of his employment or within the scope of his authority directed [fol. 10] the intestate to stop work and to leave the employment, whereupon the defendant's foreman shot the intestate (Rec., p. 2), and the second count declares that the intestate was about his work on August 31st and doing what he was employed to do when the foreman directed him to leave the work and employment and then shot him (Rec., p. 3). If the plaintiff can recover, it must be upon the case made by his pleadings and not otherwise. Citation of authorities to this point is needless.

The plaintiff's witnesses, other than Dodson himself, testified, as has been shown above (p. 3 of the petition), that Dodson told Bryant on Monday morning when he came to his work, "I can't work you any longer" (Rec., p. 83), "I ain't got anything more for you to do" (Rec., pp. 59, 65), "I don't need you any longer" (Rec., p. 40), "I ain't going to work you any more" (Rec., pp. 134-5), and the intestate himself had said on his way to work that, "I guess Dodson

will fire me this morning," (Rec., p. 161). This evidence supported the averment of the declaration that Dodson discharged Bryant on the day of and immediately prior to the shooting, and upon the authorities cited above the federal employer's act is paramount and exclusively controls the relations of the defendant and the intestate and permits no recovery in this case.

Dodson himself, however, testified for the plaintiff that on the preceding Saturday he said to Bryant, "After this evening, remember I don't work you any more" (Rec., p. 110).

Upon this evidence it may be urged either (1) that while in fact the defendant's foreman discharged Bryant, the intestate, on Saturday, thirty-six hours before the shooting, his execution of his authority to discharge employees was not complete and final until Monday, at the time of the shooting, so that regardless of what occurred on Saturday the defendant's foreman was discharging Bryant from its employment on Monday, or (2) that Bryant was discharged on Saturday and that when the defendant's foreman assaulted him on Monday the foreman was performing some other duty, or exercising some other authority than the duty and authority to discharge Bryant.

(1) If it be suggested that the duty and authority to discharge Bryant were not executed and exercised by acting foreman Dodson until Monday, when the shooting occurred, although the exercise of such authority was begun on the [fol. 11] preceding Saturday, then the plaintiff's intestate was still employed by the defendant on the day of the shooting; at that time the defendant was engaged in and the plaintiff's intestate was employed in interstate commerce and their relations as master and servant are exclusively controlled by the federal employer's liability act. And in such case the plaintiff cannot recover for his intestate's injury and death, as has been fully shown by the authorities cited above.

(2) If, however, it be urged that Bryant in fact was discharged on Saturday it necessarily is admitted that acting foreman Dodson's power to discharge Bryant was completely exercised and executed thirty-six hours before the shooting and that his subsequent assault upon the plaintiff's intestate was not done within the scope of that authority.

It must also be admitted in such case that the plaintiff's intestate on the morning of the shooting was not an employee, an invitee, or a licensee, but was a mere trespasser.

The case is to be considered then as that of a trespasser, thirty-six hours out of the defendant's employment, prosecuting his private quarrel with the defendant's employee and coming on the defendant's premises for that purpose. He was prosecuting his private quarrel, for Dodson testified for the plaintiff that Bryant had told him on Saturday afternoon, "If you cause me to lose my job I will kill you" (Rec., p. 110), the intestate that morning on his way to the place had declared to the plaintiff's witness, Thompson, referring to Dodson, that "one or t'other of us would have to take a whipping" (Rec., p. 161); and just before the shooting the intestate had threatened Dodson, "I will give you what is coming to you this morning" (Rec., pp. 66, 68).

The plaintiff introduced, and there was no evidence whatever that acting foreman Dodson was authorized to expel trespassers from the defendant's premises or to interfere with them in any manner whatever, and the defendant proved that he was not given "any authority to police or guard the railroad tracks against trespassers (Rec., p. 207). His whole duty, as shown by the evidence, was: To go ahead with the work being done on the track, detailed by the witness Long, which would take four or five days to complete, to control the men under him upon that work, and to look after the general condition of the track, surface and line over the section of four miles (Rec., p. 207).

Upon this evidence it is clear that Dodson was discharging no duty to his employer whatever, that his assault upon the plaintiff's intestate was not in furtherance of any work [fol. 12] he was to do for his employer, and that in shooting the intestate Dodson was acting for his personal and private aims alone.

Before citing any authorities it is repeated and emphasized that there is no middle ground in this matter. Either Bryant was an employee on Monday morning prior to the shooting, in which case the federal employer's liability act is paramount and permits no recovery, or Bryant had not been an employee for thirty-six hours prior to the shooting, was a mere trespasser, and Dodson was charged with no

duty and vested with no authority whatever in seeking to expel him from the defendant's premises or in assaulting him.

In Myers v. Lewis, 121 Va. 50, 71, it was said that the test of the liability of the master for the tortious act of the servant "is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a non-tortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the tortious manner in which the transaction is conducted or a service is performed, entrusted by the former to the latter to be conducted or performed for him in a non-tortious manner."

Applying this test, "Whether, if the act had been done in a non-tortious manner, the service itself, in which the tortious act was done," was within the scope of acting foreman Dodson's authority: What service was Dodson endeavoring to perform for his principal, the defendant? He was not discharging Bryant, for that service had been accomplished thirty-six hours before at another place, and if, at the time of the shooting, he had been discharging that service it has been seen that the federal employer's liability act excludes the operation of any other rule of law or any liability.

Was he protecting his employer's property, the tracks or the surface of the line? The safety of the defendant's property was not endangered; no evidence in the record suggest this theory.

Was he seeking to prevent interference with his and his men's work? No evidence in the record shows that Bryant had interfered or sought to interfere with the men, or with the lever car, and the place of work was one mile distant, so that this theory is untenable.

[fol. 13] Was he seeking to expel a trespasser from the defendant's premises? If so, the evidence proves that Dodson had no authority and no power in that connection. He

was not a policeman, he had no authority to police and he was not authorized to eject or expel trespassers (Rec., p. 207). Thus, we find that applying the test laid down by Myers v. Lewis, "the service in which the tortious act was done was not incident to the employment."

In Davis v. Merrill, 133 Va. 69, 77, the Court, referring to 2 Mechem on Agency, approves a definition of "scope of employment" which excludes such acts as arise "wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account." In this case the evidence shows that Dodson's act arose wholly from an external, independent and personal motive on his part. The evidence shows Bryant's repeated threats to whip Dodson; Dodson's reply to Bryant's threat: "All right, fellow, I have got the difference in my pocket" (Rec., p. 161); Bryant's threat immediately prior to the shooting, then to whip Dodson (Rec., pp. 68).

In this connection see Roberts v. Southern R. Co., 143 N. C. 176, 55 S. E. 509, 8 L. R. A. (N. S.) 798.

The defendant's servant, Dodson, did not shoot the plaintiff's intestate in the exercise of any authority, express or implied, conferred upon him by the defendant, or in furtherance of the defendant's business, which it was employed to do, or in the scope of his employment.

The second count of the declaration alleges that the defendant negligently employed and had in its service a foreman (Dodson) "who was unfit and a dangerous person to perform the duties of foreman and under whom the said intestate was required to work," and that the foreman "acting in the course of his employment, or within the scope of his authority, directed the intestate to leave the work and employment, and intestate did not leave at once" * * * "And the said foreman of said defendant, in the course of his employment, or within the scope of his authority, drew his pistol" and shot the intestate.

It will be observed that there is a complete non sequitur between the averment that the defendant employed an unfit and dangerous person to perform the duties of foreman, and the averment that the foreman shot the defendant. The declaration does not show that the employment of such unfit and dangerous person was the proximate cause of the intestate's injury, so that a discussion of the evidence as

to Dodson's character may well be immaterial upon the case pleaded.

[fol. 14] In addition to this, as is presently shown, the defendant's alleged personal fault in selecting and keeping an employee in its service does not affect the right to recover. If Dodson shot a stranger while acting within the scope of his employment the defendant would be liable no matter how mild and temperate Dodson's character may have been, and, on the other hand, if such shooting was not within the scope of his employment, the defendant could not be held liable no matter how violent and dangerous a man Dodson may have been.

The evidence, however, utterly fails to show that Dodson was an unfit and dangerous person to perform the duties of foreman. The plaintiff's witnesses who testified upon the point at all said that they had never known of him being involved in a personal difficulty or heard of him having a fight. Frank Alfred testified that he was neither a profane nor a fighting man, "I never knowed him to be in no fight" (Rec., p. 153); S. J. Wright testified that he had never heard of Dodson having any difficulty with any of the men (Rec., p. 181); E. C. Thompson testified that Dodson never had a fight or difficulty with any man, that he never heard of Dodson striking anybody, never saw him strike anybody and that he was not a fighter or never had a fight or anything like that (Rec., p. 185); Dodson's superiors, the supervisor of tracks and the section foreman testified for the defendant that Dodson was a competent man, of good character, handled men well, got along well with his work and that no one had ever complained of Dodson to either witness (Rec., pp. 203, 204, 192, 195). There was an utter absence of any evidence that Dodson was vicious, dangerous or violent. The plaintiff's witness, G. T. Wright, testified that Dodson was a high tempered man and hard to get along with, a "contrary" man (Rec., p. 18), sick most of the time with his stomach (Rec., p. 19), who "ate oatmeal" (Rec., p. 20); S. J. Wright testified that "he would fly up where I didn't think he had any business doing it" (Rec., p. 46); Taylor Thompson testified that "he would get mad pretty easy at most anything" (Rec., p. 79), that "he eat a lot of bran and had indigestion" (Rec., p. 80); "he got along with the men, with most of them fairly well, he would

fall out with some of them pretty often, he would get mad pretty quick" (Rec., p. 81); Pierce, that he would "fly off with little things that possibly wouldn't amount to anything much" (Rec., p. 86); E. C. Thompson, that he was high tempered and "would fly up and get mad" (Rec., p. 126), and "wouldn't speak to you hardly ever at times [fol. 15] and then again he would be just as friendly as he could be" (Rec., p. 127); "he would just stop speaking" (Rec., p. 129).

If Bryant came on the premises as an employee and was then discharged, the federal employer's liability act governs and, regardless of Dodson's character, there can be no liability upon the defendant. If Bryant, the intestate, did not come on the premises an employee, but was a stranger and a trespasser at the time of the shooting and the defendant can be held liable, if at all, only under the doctrine of respondeat superior, there can be liability only if Dodson was acting within the scope of his employment in shooting him. Dodson's previous character, whether good or bad, is a matter of indifference. As stated in 6 Labatt, Master and Servant, 2nd ed., Sec. 2224, the master's freedom from personal fault, whether it be in respect to the hiring or retention of the servant in question, does not affect the right of recovery.

This is the rule in Virginia in cases where the foundation of the liability sought to be imposed is the negligent act, not the wilful act of the servant; of necessity the same rule applies where the servant's act complained of is wilful or malicious.

In the case of Virginia Ry. & P. Co. v. Davidson, 119 Va. 313, a stranger was killed through an employee's alleged negligence and the question involved was the admissibility of evidence as to the employee's competency. It was said (p. 319):

"The mere retention in service of a careless employee does not give rise to a cause of action against the employer. This is true even in cases between master and servant where the foundation of the liability is in the employment of incompetent or unfit fellow-servants. * * * The mere employment or retention of an unfit servant cannot be the proximate cause of an accident;"

and again the Court said (p. 323):

"But, as already stated, even in cases between master and servant, the mere employment of an incompetent or careless servant gives no right of action, and the evidence of the latter's reputation is not admitted as tending to show the specific negligence for which the recovery is [fol. 16] sought. That must appear as an independent fact and by independent proof; and the character evidence is admitted for the reasons already stated. In actions brought by a stranger the reason for the rule which permits evidence of reputation does not exist, and the rule itself, therefore, does not apply."

That is to say, that in actions brought by a stranger, evidence of reputation of the employee doing the mischief cannot be used at all against the employer; the reason of course being that the case must depend upon the character of the act causing the injury. And the Court further in its opinion (p. 324) quoted with approval, from the case of Fonda v. St. Paul City Ry. Co., 71 Minn., 74 N. W. 160, 70 Am. St. 341, in which the plaintiff was a stranger and where evidence of the general incompetency of the motorman was introduced, in part as follows:

"The defendant is liable, if at all, for the acts of its servant upon the doctrine of respondeat superior. If the motorman was negligent on this occasion, the defendant is liable, no matter how competent he was or how habitually careful he had been on other occasions. On the other hand, if he was not negligent on this occasion, the defendant is not liable, notwithstanding that he may have been incompetent or habitually careless on former occasions. The sole issue aside from that as to plaintiff's contributory negligence was, whether or not the motorman was guilty of negligence at the time of the accident."

Paraphrasing this quotation: If foreman Dodson was acting within the scope of his employment on this occasion, the defendant is liable to a third person, no matter how competent Dodson was or how habitually good tempered he had been on other occasions. On the other hand, if he was not acting within the scope of his employment on this occa-

sion, the defendant is not liable, notwithstanding that Dodson may have been a violent and dangerous man on former occasions. The sole issue is, whether or not Dodson was acting within the scope of his employment at the time of the shooting.

[fol. 17] Your petitioner insists that this case is governed by the federal employer's liability act to the exclusion of any common law rule, that under that act it cannot be held liable in this case and that the action of the Circuit Court in overruling its demurrer was directly contrary to the decision of the United States Supreme Court in the case of Davis v. Green, 260 U. S. 349, 67 L. ed. 299, above referred to, which authoritatively and finally settled the question.

If it should be considered, however, that the plaintiff's intestate was not an employee on the Monday morning of the shooting but had been discharged on the Saturday before, there can be no liability upon the defendant for the reason that the evidence is clear that its employee, Dodson, was without any authority to police the defendant's premises or to interfere with or expel trespassers, and that, with reference to the plaintiff's intestate, the defendant's employee, Dodson, had no authority, express or implied, and consequently was not acting within the scope of his employment in shooting him.

For the foregoing reasons and such others as may be assigned at the hearing, your petitioner prays that a writ of error and supersedeas to the said judgment may be awarded to it, and that the said judgment may be reviewed and reversed.

And your petitioner will ever pray, etc.

The Chesapeake & Ohio Railway Company, by its Attorney. J. M. Perry, Attorney.

[fol. 18] I, J. M. Perry, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment of the Circuit Court of Alleghany County in the suit of R. L. Bryant, Admr. of M. L. Bryant, dec'd, vs. The Chesapeake & Ohio Railway Company, the record of which is annexed, should be reviewed by the Supreme Court of Appeals of Virginia.

Given under my hand this 21st day of June, 1927:

J. M. Perry.

Received June 23, 1927. J. M. K.

Writ of error allowed; supersedeas awarded. Bond $10,000.

Robert R. Prentis.

[fol. 19] [Caption omitted]

IN CIRCUIT COURT OF ALLEGHANY COUNTY

R. L. BRYANT, Administrator of M. L. Bryant, Deceased,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY

DECLARATION

R. L. Bryant, Administrator of M. L. Bryant, deceased, complaints of the Chesapeake and Ohio Railway Company, defendant, of a plea of trespass on the case, for this, to-wit, that heretofore, to-wit, before and at the time of the happening of the mischief hereinafter complained of, said defendant owned and operated a railroad, extending through the County of Alleghany, in the State of Virginia, by its station in the said County known as Backbone, and said plaintiff's intestate, M. L. Bryant, was employed by said defendant as a section hand to work with a gang of section hands employed by said defendant, to work under a foreman and servant of said defendant, to maintain and [fol. 20] keep in repair the road-bed and railroad tracks of said defendant embraced in a section of said road at Backbone in said County. And it was the duty of said defendant to exercise reasonable care for the safety of its servants, and it was the special duty of said defendant not to wrongfully injure or kill its servants, or any one of them, while in its employment, or after dismissing or discharging them, or any one of them, from its service. But said defendant disregarded its duty in this behalf, and, to-wit, on Monday morning, August 31, 1925, when said intestate began his day's work for said defendant as its servant on said section of said defendant's railroad at Backbone in said County, where he was employed to work under the orders and directions of said defendant's foreman and servant in charge, and the said foreman acting for said defendant, in the course of his employment, or within the scope of his

authority, directed said intestate to stop work and to leave the employment, and the said intestate did not after he was discharged leave the premises immediately, and thereupon said foreman and servant of the said defendant, acting as the servant and employee of the defendant, and in the course, or scope of his employment, drew a pistol loaded with bullets and shot said intestate, and as he attempted to flee from defendant's railway bed and tracks, said foreman followed and repeatedly shot and mortally wounded said intestate, and from the effect of his wounds he died shortly thereafter, after having suffered great pain and agony; and said intestate's death was caused by said wrongful act of said defendant company.

Second Count. And for this also, to-wit, that heretofore to-wit, before and at the time of the happening of the mischief hereinafter complained of, said defendant owned and operated a railroad, extending through the County of Alleghany, in the State of Virginia, by its station in the said County known as Backbone, and said plaintiff's intestate, M. L. Bryant, was employed by said defendant as a section ha-d to work with a gang of section hands employed by said defendant, to work under a foreman and servant of said defendant, to maintain and keep in repair the road-bed and railroad tracks of said defendant embraced in a section of said road at Backbone in said County. And it was the duty of said defendant not to employ and keep in its service, as section foreman in charge of said intestate and other section hands working under said foreman, a foreman who was unfit and a dangerous person to act as its foreman and who in the course of his employment was liable in a fit of anger and passion to injure or kill any one of defendant's servants working under said foreman or after being discharged by him. But said defendant disregarded its duty [fol. 21] altogether in this behalf and negligently employed and had in its service at the time of the happening of the mischief hereinafter complained of a foreman who was unfit and a dangerous person to perform the duties of foreman and under whom the said intestate was required to work, and while said intestate was about his work, on the morning of August 31, 1925, and doing what he was employed to do, the said foreman, acting in the course of his employment, or within the scope of his authority, directed

the intestate to leave the work and employment, and intestate did not leave at once and made some excuse for not leaving and the said foreman, of said defendant, in the course of his employment, or within the scope of his authority drew his pistol loaded with bullets and shot the said intestate and as he fled, the said foreman followed and shot intestate repeatedly and mortally wounded him and from his wounds intestate shortly afterwards died, after having suffered great pain and agony; and his death was caused by defendant's negligence in employing and keeping in its service said foreman, whom the defendant knew, or ought to have known, by the exercise of ordinary care, was unfit to act and a dangerous person to be in charge of its section hands.

Wherefore, the said plaintiff, administrator aforesaid, says that he is entitled to recover damages from said defendant, to the amount of Ten Thousand Dollars ($10,000), under the laws of the State of Virginia, for such cases made and provided. And therefore, he brings his suite.

R. L. Bryant, Admr, of M. L. Bryant, Deceased, by Counsel. O. B. Harvey, Curry & Carter, p. q.

In Circuit Court of Alleghany County

[Title omitted]

[fol. 22] Plea—July 16, 1926

This day came the parties by their attorneys and thereupon the Defendant by its attorney for Plea says it is not guilty in manner and for, as the Plaintiff in his Declaration has alleged. And this case is continued.

In Circuit Court of Alleghany County

[Title omitted]

Order Granting Leave to File Special Plea—Oct. 15, 1926

This day came the parties by their attorneys and thereupon the Defendant by its attorney asked leave of the

Court to file in writing its special plea, which is accordingly filed with the right to the Plaintiff to make such defenses to said plea at a later day of the term as it might make at this time.

The special Plea referred to in the foregoing order is in the words and figures following, to-wit:

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

SPECIAL PLEA

And for a further plea in this behalf, the said defendant, by its attorney, says:

That before and at the time of the supposed commission of the grievances alleged against it by the plaintiff, the defendant was a common carrier by railroad and owned and operated a railroad in and through the County of [fol. 23] Alleghany and the State of Virginia and in the State of West Virginia and in other states, and on and with the said railroad the defendant as such common carrier then was engaged in interstate commerce; and at the day aforesaid the plaintiff's intestate had been and was employed by the defendant to work and labor and worked and labored, as one of the defendant's section force of laborers, in and about the maintenance, upkeep and repair, in said Alleghany County, of the defendant's said interstate railroad, its roadbed, ties and tracks; and said railroad, roadbed, ties and tracks the said defendant then was using as aforesaid in interstate commerce, and the plaintiff's said intestate, as such section laborer, then was engaged in interstate commerce.

And the defendant says that its said railroad and its use thereof and its employment of the plaintiff's intestate and the engagement of said intestate in interstate commerce were and are the defendant's railroad and the defendant's employment of plaintiff's intestate in the said counts mentioned.

And the defendant says that the injury of the plaintiff's intestate in said declaration alleged was not done and inflicted and the said death of the plaintiff's intestate did not

result in whole or in part from the negligence of any of the officers, agents or employees of the defendant.

And this the defendant is ready to verify.

J. M. Perry, p. d.

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO AMEND DECLARATION, ETC.—Oct. 22, 1926

This day came the parties, by their attorneys, and upon motion of the plaintiff, by counsel, leave is given him to amend his declaration at the bar of the Court, and it is so [fol. 24] ordered that, by striking out the word "in" and substituting therefore the word "after" in the eighth line from the bottom of page 1 of the declaration in the first count, between the words "or" and "dismissing"; and by striking out the words "stopped work and" and substituting therefore the words "after he was discharged" in the first count, on page 2 and fourth line from the top of page, and between the words "Not" and "leave," and by adding the words "or after being discharged by him, and by adding the words "or after being discharged by him" in the second count on page 2, in second line from bottom and after the word "foreman" at the beginning of said second line; and by striking out the word "as" in the twelfth line from the top of page 3 and by inserting in the room and stead thereof the word "shot" and in the same line, by inserting the words "and as he" after the word "intestate." And thereupon the plaintiff moved the Court to strike out the special plea of the defendant filed in this action October 15, 1926, upon the ground that it had been filed too late under the provisions of Section 6105 of the Code of Virginia and that it raised a question that was outside and foreign to the case stated in the declaration, but the Court overruled the plaintiff's motion to strike out the said special plea and the plaintiff excepted. And thereupon the plaintiff offered to file his special replication to the said special plea of the defendant and the defendant thereupon moved the Court to reject the said replication upon the grounds,

first, that said replication is bad for duplicity and, second, that it is a departure from the plaintiff's case as he has declared it, but the Court overruled the motion of the defendant and ordered the replication to be filed, which was accordingly done, and the defendant thereupon excepted.

The replication to special plea referred to in the foregoing order is in the words and figures following, to-wit:

In Circuit Court of Alleghany County

[Title omitted]

Replication to Special Plea

And the said plaintiff comes and says, that at the time of the happening of the mischief in the declaration complained of the said plaintiff's intestate was not, as in the defendant's special plea alleged, in the employment of the [fol. 25] defendant, and not engaged in interstate commerce. And this the said plaintiff prays may be inquired of by the country.

Curry and Carter, R. B. Stephenson, p. q.

In Circuit Court of Alleghany County

[Title omitted]

Motion to Strike Replication

The Defendant moves to strike out and reject the plaintiff's replication to its special plea, on the grounds first, that said replication is bad for duplicity, and, second, that said replication departs from the plaintiff's case as he has declared it.

J. M. Perry, p. d.

In Circuit Court of Alleghany County

[Title omitted]

Minute Entry—April 27, 1927

This day came the parties by their attorneys and thereupon the Defendant by its attorney filed in writing a statement of the grounds of its defense and a jury being de-

manded thereupon came a jury of seven persons of this county, drawn, summoned and selected in the manner [fol. 26] directed by law, to-wit: F. A. Carter, R. E. Crizer, C. E. Wolfe, W. Robert Owens, Carl Kesner, Ralph V. Metz and C. J. Jones, to whom there was no objection and who were sworn the truth to speak upon the issues joined; and having heard the evidence in part are adjourned over until tomorrow morning at half past nine o'clock.

The statement of ground of defense referred to in the foregoing order are in the words and figures following, to-wit:

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

STATEMENT OF GROUNDS OF DEFENSE

By way of defence to this action, the defendant will rely upon the following:

I. That it was not guilty of the acts alleged against it in each of the counts of the declaration, and the death of the intestate was not proximately caused by any negligent act or omission on the part of the defendant, as is alleged in the said two counts of the declaration, or either of them.

II. That the killing of the plaintiff's intestate by Dodson (who is the person referred to in the plaintiff's declaration as the defendant's foreman) was not within the scope of said Dodson's employment by the defendant, and was not in the prosecution of the defendant's work, and was a matter for which the defendant was in no wise responsible.

III. That the plaintiff's intestate and the said Dodson were employed by the defendant in interstate commerce at the time of the occurrence of the intestate's said killing, and the defendant then was engaged in interstate commerce; and the defendant was not guilty of any negligence whatever proximately causing or resulting in the intestate's death, and said Dodson, in shooting the intestate, was not acting within the scope of his employment, nor was the said act done in furtherance of the defendant's work or as a part thereof.

[fol. 27] IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

VERDICT AND JUDGMENT—April 28, 1927

This day came again the parties by their attorneys and the Jury adjourned over on yesterday appeared pursuant to their adjournment and heard the evidence in full. Thereupon the Defendant, by its attorney, demurred to the evidence, filing its demurrer in writing, with its statement of the grounds thereof, and the Plaintiff, by his attorneys, joined therein. And the Jury having retired to consider of their verdict, returned into Court and upon their oaths say, "We the Jury upon the issues joined do find for the Plaintiff and assess his damages at $8000.00 if the law be with the Plaintiff; and if the law be with the Defendant, do find for the Defendant." And the Jury are discharged. And the demurrer to the evidence, aforesaid, being argued, and the Court being of the opinion that the law is with the Plaintiff doth overrule said demurrer. Therefore it is considered by the Court that the Plaintiff recover from the Defendant the sum of Eight Thousand Dollars, the damages awarded by the Jury in their verdict aforesaid, with legal interest thereon from this date till paid and his costs by him about his suit in this behalf expended. And it appearing to the Court that the Jury by their verdict have failed to apportion the damages among the widow and children of the deceased, the Court doth proceed to hear evidence and doth direct the Administrator, after the payment of costs of administration and counsel fees, to pay the entire residue of the recovery to Orie Bryant, the widow. But the Defendant desiring to apply to the Supreme Court of Appeals for a writ of error it is further ordered that the execution of this Judgment be, and the same is hereby suspended for the period of sixty days from this day, the Plaintiff by counsel waiving the bond required by statute in such case.

The Evidence referred to in the foregoing order is in the words and figures following, to-wit:

[fol. 28] In Circuit Court of Alleghany County

Statement of Evidence

Stipulation re Death of Marshall Bryant

It is stipulated that Marshall Bryant died September 3rd, 1925, as a result of pistol wounds incicted upon him by Con. P. Dodson, on August 31, 1925, at or near Backbone, Alleghany County, Va.

Evidence Introduced on Behalf of Plaintiff

G. T. Wright sworn for Plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is G. T. Wright?
A. Yes, sir.
Q. Were you raised in this county?
A. Yes, sir.
Q. What is your age?
A. 49.
Q. You were raised on Pott's Creek, were you not?
A. Yes, sir, 20 miles from here.
Q. And you have lived in Alleghany County practically all of your life, haven't you?
A. Yes, sir.
Q. Mr. Wright, have you been employed by the Chesapeake & Ohio Railway Co. at Backbone for some time previous to the time that Mr. Marshall Bryant was killed, I mean before that time?
A. Yes, sir, I had been there three years before that.
Q. You had been working there for three years at that time?
A. Yes, sir, about three years at that time, up until the time he was killed.
Q. Did you know Mr. Con Dodson?

A. Yes, sir.

Q. Was he working there during that time?

A. Yes, sir.

Q. In what capacity did he work? Or what did Mr. Dodson do?

A. He worked on the section just the same as I did and the other men.

[fol. 29] Q. All the time?

A. Yes, sir.

Q. And later did he do other work?

A. Yes, sir, he done other work later on.

Q. What was that?

A. He was put in as a sub-foreman for a while.

Q. And later was he a foreman?

By Mr. Perry: I object to the question as leading. The witness can tell what he did, and what his place was.

By the Court: I sustain the objection. You can ask him what other positions he held with the railroad company.

By Mr. Stephenson:

Q. Now Mr. Wright, you said that Mr. Dodson worked as an Assistant Foreman for a while?

A. Yes, sir.

Q. What did he do while he was Assistant Foreman?

A. While he was assistant foreman he cut off the right of way and pulled up the low joints in the track, dressed up the track and he generally then worked about from two to three men.

Q. Just a small squad?

A. Yes, sir.

Q. Now later on did he hold any other position with the Company besides Assistant Foreman?

A. Yes, sir, he took the whole force over while Mr. Long was off, about three days.

Q. Previous to the time Mr. Long was off, what did he do shortly previous to that?

A. That is, before he taken this job?

Q. Yes, sir?

A. He was a kind of a sub-foreman then.

Q. Did he have a squad of men of his own?

A. Yes, sir.

Q. That he was responsible for?

Objection. Sustained.

[fol. 30] Q. When he was working a squad of men and Mr. Long was there, Mr. Long was the regular foreman, was he not?

A. Yes, sir, he was the regular foreman.

Q. When he was working that squad and Mr. Long was there, how did they work, together or separately?

A. They worked separately.

Q. What do you mean by separately?

A. Well, I suppose maybe Long was a mile or a half a mile from Dodson.

Q. Mr. Long was working one crew at one place on the track and Mr. Dodson was working another one, he had another squad at some remote or different part of the track?

A. Yes, sir.

Q. What number of men was he working?

A. Long worked a pretty good crew, something like seven or eight, and Dodson after he mowed the right of way off and while they were mowing the right of way he had about four or five men, and when they put him to dressing up the track and filling up the low places in the track, he gave him two or three men.

Q. Now was Mr. Long the regular section foreman?

A. Yes, sir.

Q. Was he away from the work a good deal in the month previous to the shooting of Marshall Bryant?

A. No, sir, he wasn't away very much, maybe a day or two out of a week for about three weeks.

Q. A day or two off and on?

A. Yes, sir.

Q. Was he away at the time of his mother's death, or do you recall?

A. He was away then about three days.

Q. What day did he go away that time?

A. I don't recollect but it was something about the middle of the week, I think, about Wednesday or Thursday.

Q. And he was not in charge of the men then again until after Monday or until after Bryant was killed? Is that correct?

A. Yes, sir, he came back and took charge of the men after Dodson killed Bryant, Monday morning.

Q. Now while Mr. Long, the regular foreman was gone from Thursday to Monday was Mr. Dodson in charge of all the men on the section?

A. Yes, sir, he was in charge of all of them while he was gone.

Q. Did you and the others work there for him on the section?

[fol. 31] A. Yes, sir, I never worked right under him, I was ditching along the track and I always worked by myself, but of course I seen him passing backwards and forwards.

Q. But the entire section crew was under his orders or under his control?

A. Yes, sir, under his control.

Q. Do you know whether or not it was the custom of the foreman, Mr. Long, to employ and discharge hands that worked under him?

By Mr. Perry: I object to the question as leading in the first place and in the second place it is very suggestive of the answer.

By the Court: He might ask the question who did the hiring and firing of the men working on the section.

By Mr. Stephenson:

Q. Very well, who did the hiring and the firing of the men on the section?

A. Long was supposed to hire the men and fire the men.

Q. And you have been there for three years?

A. Yes, sir, and that had been the custom.

Q. Do you know anything about Dodson with reference to that matter, of hiring and firing men previous to the time Long left?

A. I don't know how that is ——

By Mr. Perry: Don't answer the question if you don't know how it was in this case.

A. Whether Dodson was supposed to hire the men, or not, but when I was sub-foreman——

By Mr. Perry: I object to that.

By the Court: Yes, I sustain the objection. The question is whether Dodson had the right to hire and fire men.

[fol. 32] By Mr. Stephenson:

Q. Was it the practice of the foremen who was on the section to hire and fire the men, was that the common practice?

A. Yes, sir.

Q. Without any question?

A. Yes, sir.

Q. Do you know whether or not Mr. Dodson had discharged men when he was working a crew there separate and apart from Mr. Long and while Mr. Long was on the works?

By Mr. Perry: I object to the question as irrelevant.

By the Court: Do you mean some other occasion and some other time.

By Mr. Stephenson: Yes.

By the Court: He may answer the question. I overrule the objection. Defendant excepts.

A. Yes, sir, while they worked there he fired three men, or two of them. He fired Snead, at least he told me that he fired him. I was working right close to Dodson and he came down by me, and I think he fired Matheny.

By Mr. Perry: I object to that and move to strike it out.

By the Court: Yes, he cannot tell what he was told.

By Mr. Stephenson:

Q. Just tell what you saw and what you know yourself.

A. I asked him why he wasn't working.

Q. Don't state the talk you had but just state the facts, if you know it as a fact, that he discharged them and they left. Did you, or not, see these men leave Dodson's force and leave the premises?

A. No, sir, I didn't see them come right away from him, they were a few yards above me.

[fol. 33] Q. But you saw them coming away from where his forces were working?

A. Yes, sir.

Q. Did they leave the premises and quit work at that time?

A. They never did work there any more.

Q. That was a man by the name of Snead and a man by the name of Matheny?

A. Yes, sir.

Q. And how long was that before the killing of Marshall Bryant, approximately?

A. I expect it was something like a week.

Q. And he was at that time in charge of one section of the crew and Mr. Long was in charge of another section?

A. Yes, sir.

Q. Now when Mr. Long went away as you have testified, Mr. Dodson remained in charge of the full crew, or all that were left. Is that right?

A. Yes, sir.

Q. Now I want you to tell the jury what type of man Mr. Con P. Dodson was?

Mr. Perry: I object to the question as irrelevant and incompetent.

Objection overruled. Defendant excepts.

By Mr. Stephenson:

Q. I mean with reference to his characteristics in handling men, you understand, his temperament, and temper &c.

A. He was a high tempered man, and he was a man that I wouldn't work under.

Q. You say you would not work under him?

A. Yes, sir, I said that. He was a high tempered man and he was a hard man to get along with. Of course I had a little trouble with him, just walking along with him, and I didn't want to have any more trouble at all, and I wouldn't like to work with him or under him.

Q. What kind of a man was he. You say he was high-tempered. Was he an irritable man to get along with?

A. Yes, sir, he was a hard man to get along with and what I call a contrary man.

[fol. 34] Q. Irritable and contrary?

A. You couldn't suit him in no way you would do your work.

Q. And did he have the faculty of getting along with the men at all? I mean as a foreman over them?

By Mr. Perry: I object to the question as irrlevant and entirely incompetent.

By the Court: I do not think it is irrelevant or incompetent if this witness knows whether he had the faculty of getting along with men, if he knows that I think he ought to be allowed to state what he knows about it.

Defendant excepts.

By Mr. Stephenson:

Q. Read the question.

(Question read to witness.)

A. No, sir, he had right smart trouble with the men that ever worked with him, he was a hard man to get along with.

Q. Was he a man of peculiar nervous and irritable disposition?

Objected to as leading. Overruled. Exception.

A. Yes, sir.

Q. Did he have physical ailments that tended to make him that way, that you know of?

Same objection. Overruled. Exception.

A. No, sir, I don't know that he was, only he was sick most of the time with his stomach.

Q. Sick with his stomach?

A. Yes, sir.

Q. Could he or did he eat what the average and ordinary man would eat?

A. He told me he couldn't——

By Mr. Perry: I object to the answer and ask that it be stricken out.

[fol. 35] By the Court: That may be stricken out.

By Mr. Stephenson: We are trying to show what ailments he had that would tend to make him irritable.

By the Court: I know, but you will have to prove that by some other evidence than Dodson's declaration or what Dodson told him.

By Mr. Stephenson: Would it be proper to show what kind of food he ate?

By the Court: If he knows:

By Mr. Stephenson:

Q. Do you know what kind of food he ate?

A. He told me he ate oat meal.

By Mr. Perry: I object to what he told him.

By the Court:

Q. What you know yourself. Did you ever see him eat?

A. No, sir.

By Mr. Stephenson:

Q. You don't know then?

A. No, sir, only what he told me.

Q. Now you were there with him for three years you have stated, on the work?

A. Yes, sir.

Q. Was he a competent or fit man to handle other men on the works?

Objection. Sustained. Exception.

By Mr. Stephenson: Couldn't he express an opinion on that?

[fol. 36] By the Court: No, sir. He can testify to any peculiar characteristics of Mr. Dodson, if he had any, and any other facts and then as to whether such a man as that is competent is an opinion which the jury could form as well as he, I think.

By Mr. Stephenson:

Q. Now you said that he could not get along with men generally?

A. No, sir, he couldn't get along with men.

Q. Now the condition you have described and the peculiar things that were about Mr. Dodson there, the peculiarities of his, were they commonly known amongst the men that worked there with him; just as you had, and by everybody, was that generally known, or not?

A. Yes, sir.
Q. It was well known?
A. Yes, sir.
Q. You were not present at the killing, were you?
A. No, sir,
Q. Were you out to work with the crew on Sunday previous to Marshall Bryant's death?
A. Yes, sir.
Q. Was that the ordinary work or was it a special call of some kind?
A It was a wreck that happened at B. S. Cabin on Saturday evening late.
Q. Was Mr. Dodson in charge that day, or not?
A. Yes, sir, he was in charge that day. The men was bringing the motor car to Covington and Dodson wasn't along, and we came on down there and worked that night until 12 o'clock.
Q. He was in charge of you men and sent you down there, didn't he?
A. No, sir he was a Backbone and we were here at the wreck and Mr. Young took us on down there.
Q. But Mr. Dodson sent you out didn't he to the work?
A. Yes, sir.
Q. Was that on Sunday that you were working?
A. That was on Saturday night and then Dodson went back with us on Sunday morning.
Q. On Sunday morning Dodson went back with you?
A. Yes, sir.
[fol. 37] Q. Was the deceased, Marshall Bryant, with you on either Saturday night or Sunday working on that wreck?
A. No. sir.
Q. He was not with you?
A. No, sir.
Q. Do you know why he was not along?
A. No, sir, I don't.

Cross-examination.

By Mr. Perry:

Q. Mr. Wright, you say you had trouble with Dodson?
A. Yes, sir.
Q. When was your trouble, how long before this killing?
A. Before he killed Bryant you mean?

Q. Yes, sir?

A. Yes, sir, it was before that.

Q. How long before he killed him?

A. I expect it was about two or three months.

Q. Now when Mr. Long was working on the section and Dodson was doing the ditching or cutting the right of way, how many men did he have under him?

A. He had about four or five.

Q. Where did they start out from in the morning to that work?

A. From the tool house.

Q. When they started out in the morning from the tool house was Mr. Long there with the rest of the section men?

A. Yes, sir.

Q. Did you in that time hear Mr. Long tell Dodson to go up and cut the right of way, or not?

A. No, sir.

Q. Dodson just went on up and began to work cutting the right of way?

A. I say I never heard his tell him because I never worked in the force at that time, I was ditching along the railroad.

Q. At the end of the day when they came back, did they come back to Mr. Long's tool house?

A. Yes, sir.

Q. How long did that cutting of the right of way keep up, how long did it take to cut it?

[fol. 38] A. I think they were about a week, as well as I remember.

Q. That was usually in August, wasn't it?

A. Yes, sir.

Q. Two or three weeks before this thing happened?

A. Yes, sir.

Q. What work did they go to next?

A. They went to silling the ties.

Q. The whole force was silling?

A. Yes, sir.

Q. And Dodson was working along with the other men doing this silling?

A. Yes, sir.

Q. And Long was in charge?

A. Yes, sir.

Q. The force at that time, in this silling, was about how many men?

A. I expect there was something like 10 or 12 of them at that time.

Q. Was it not more than that, didn't they have a good many more than that?

A. I couldn't say, they were just passing by me and of course I never worked with the entire crew, I worked by myself nearly all the time in the ditches.

Q. They kept on with that silling, all the men working together under Mr. Long up to the time that Mr. Long was called away by his mother's illness, didn't they?

A. Yes, sir.

Q. That was the Thursday before?

A. Yes, sir, I think it was.

Q. You say that Mr. Long would go away a day or two a week. Do you mean that happened even before he went away on account of his mother's illness?

A. Yes, sir, most of the time he would go to see his mother, he would go over on Saturday and come back on Sunday. and he wouldn't lose but one day.

Q. Where did his mother live?

A. Over about Caldwell, I think.

Q. Were they still working at silling when Mr. Long was called away on this Thursday?

A. Yes, sir.

Q. Were you up there when Mr. Long was called away or when he left?

A. Yes, sir.

[fol. 39] Q. Did you hear any conversation between Mr. Long and Dodson at the time of his leaving?

A. No, sir.

Q. Dodson simply took his place in the work and continued on with the work?

A. He taken his place and I was working right close to them when Long went away, still I wasn't working right under Long or Dodson, either one.

Q. Who were you under?

A. In a measure I was working for Long but I was by myself just ditching on the railroad.

Q. You were not put under Dodson when Mr. Long left?

A. No, sir.

Q. Did Dodson work as a hand?

A. Yes, sir.

Q. He just worked like the other men?

A. Yes, sir, at times.

Q. And they continued that during the rest of that week in August, I believe?

A. Yes, sir.

Q. Were you present during the work on Saturday any time when the gang was working on this silling?

A. No, sir, not on the section.

Q. How far away from them were you?

A. I expect I was maybe two or three hundred yards at times and then I would move on above them or back below them.

Q. What time on Saturday evening were you called out for the wreck?

A. We were called about four o'clock.

Q. You mean four o'clock in the evening or four o'clock the next morning?

A. Four o'clock Saturday evening. The men were going to Covington here to get groceries on the motor car.

Q. Don't tell what they were going for, but just say you were called on Saturday evening about four o'clock.

A. We were called at Moss Run. Mr. Young got off No. 14 there.

Q. Who was Mr. Young?

A. He is superintendent of the road.

Q. What time did you quit work or what time did the section men quit work on Saturday?

A. Four o'clock.

[fol. 40] Q. Then this was immediately after they quit work?

A. Yes, sir.

Q. Then I understand you worked on that wreck the rest of that night?

A. Yes, sir, until about two o'clock in the night and then we went back home.

Q. Who was in charge of the work then?

A. This fellow Young.

Q. He was the Assistant Supervisor.

A. Yes, sir.

Q. The Supervisor of Track is Mr. Crance, isn't it?

A. I think Crance is.

Q. Now on Sunday was Dodson there working with the men?

A. Yes, sir.

Q. They were still at the wreck?

A. Yes, sir.

Q. And all of the men were working at the wreck?

A. Yes, sir.

Q. On Monday were you at the tool house when the killing took place?

A. No, sir, I went back to ditching. The toolhouse sets in front of my house where I live and when I came out of my house Dodson was sitting there on an iron pipe, right there.

Q. That was after the shooting?

A. No, sir.

Q. Before the shooting?

A. Yes, sir.

Q. That was before the men had come to go to work?

A. Yes, sir.

Q. What other times that you know of in the last six months before this killing was Dodson put in charge of all of the men?

A. I don't think he was put in charge of all of them only about three days while he was off to see his mother, that is the only time he had the whole force.

By Mr. Stephenson:

Q. You were asked whether all of the men were out at work on Saturday night and Sunday. Did you mean to say, or not, that Marshall Bryant was included in that number, or was he?

A. No, sir, he wasn't in it.

[fol. 41] Q. Now Mr. Crance was the man who had charge of the maintenance forces and was over Mr. Long and over Mr. Dodson, wasn't he?

A. Yes, sir.

Q. And Mr. Long when he was on the section had charge of you and all the other men in that section?

A. Yes, sir.

Q. But he was absent, as on this occasion, then Mr. Dodson had charge over you the same way?

Mr. Perry: I object to the question because the witness said there had been no other occasions.

By Mr. Stephenson: I am talking about this occasion.

Q. In other words, he was in charge of you and the other men while Mr. Long was gone on this occasion?

A. Yes, sir.

Q. Did you, or not, mean to say that Mr. Dodson was in charge of the whole force, including yourself, wasn't he?

A. Yes, sir, he was over the whole force.

Q. Including yourself?

A. Yes, sir.

Q. Were you at work at the time of the killing of Marshall Bryant?

A. Yes, sir.

Q. You had gone to work?

A. Yes, sir, I went by the toolhouse and Dodson was sitting out there and I asked him where Mr. Long was.

By Mr. Perry: I object to that, don't state what he said.

By Mr. Stephenson:

Q. But you had gone to work before the killing happened?

A. Yes, sir.

Q. You went to work at seven o'clock, didn't you?

A. Yes, sir.

Q. Or a little after seven?

A. Yes, sir.

[fol. 42] By Mr. Perry:

Q. Who gave you orders what to do while Mr. Long was away?

A. Nobody, I just kept on ditching.

Q. Didn't you say on your cross examination that Dodson was not in charge of you?

A. No, sir, he was in charge of me all right, and if he wanted me away he could have took me away from the ditching.

Q. Did anybody tell you that he was in charge of you?

A. No, sir.

Q. Did Long tell you that he was in charge of you?

A. Of me?

Q. Yes, sir?

A. No, sir.

Q. That is just your conclusion that he was in charge of you?

A. When Mr. Long went away and stayed a while I went on to my ditching, just what he told me to do.

Q. And you didn't take any orders whatever from Dodson, did you?

A. No, sir, he never told me to do anything and I don't reckon he wanted me, of course.

Q. Did you report to Dodson every day?

A. No, sir.

Q. Did you have anything to do with Dodson?

A. No, sir, but I just supposed he put my time down just like Mr. Long did, he knowed I was up there at work.

By Mr. Stephenson:

Q. Your job was not independent and separate and apart from all the other work, was it?

A. Yes, sir, I went along by myself.

Q. You would go along and clean up the ditches and work by yourself. That is what you mean, isn't it?

A. Yes, sir.

Witness stands aside.

SAMUEL J. WRIGHT sworn for plaintiff.

[fol. 43] Direct examination.

By Mr. Stephenson:

Q. This is Mr. Samuel J. Wright?

A. Yes, sir.

Q. You were raised in this county, were you not?

A. Yes, sir.

Q. On Potts Creek, were you?

A. Yes, sir.

Q. What relation are you to Mr. G. T. Wright who has just testified?

A. I am a first cousin of his.

Q. Have you been working for the Chesapeake & Ohio Railway Co. sometime previous to the time when Mr. Marshall Bryant was killed?

A. Yes, sir.

Q. On the Backbone section were you?

A. Yes, sir.

Q. For how long had you been there previous to that, about?

A. Someting close to 12 months.

Q. You knew Mr. Dodson then, did you?

A. Yes, sir.

Q. Who was the regular foreman most of the time when you were working there?

A. C. E. Long.

Q. He was the regular track foreman?

A. Yes, sir.

Q. And above him I believe was Mr. Crantz who had charge of the maintenance of Way of all this territory through here, didn't he?

A. Yes, sir.

Q. What was the common practice of Mr. Long as Section Foreman there with regard to hiring and firing or turning off hands, what was the practice?

Question objected to as Incompetent and Irrelevant.

By the Court: A question probably could be framed so as to leave out the question of common practice. You can ask Mr. Wright who generally hired the men and fired the men.

[fol. 44] By Mr. Stephenson: I submit that is practically the same thing. I cannot see the difference.

By the Court: I don't think there is much difference.

By Mr. Stephenson:

Q. Who commonly hired and fired the men employed on that section force?

A. C. E. Long, he hired them and then he turned them over to Dodson and he told him that if he fired any it would be all right.

By Mr. Perry:

Q. Were you there?

A. Yes, sir.

By Mr. Stephenson:

Q. Do you know that?

A. Yes, sir, he said it was perfectly all right, he said if Dodson fired you, you are fired.

Q. When did that instance occur that you speak of?

A. That is about the time he was cutting the right of way off, and he had a bunch on the upper end cutting this right of way off.

Q. Is that correct?

A. Yes, sir.

Q. Who had a bunch of men on the upper end?

A. Dodson.

Q. Dodson had a crew of his own?

A. Yes, sir.

Q. And they were working separate and apart from Mr. Long's crew at that time?

A. Yes, sir.

Q. Cutting off the right of way?

A. Yes, sir.

Q. And Long told him that he had the right to discharge any of them if he wanted to?

A. Yes, sir.

Q. And you heard that statement made?

A. Yes, sir.

[fol. 45] Q. Now you say that commonly and generally—I think I asked you this question, when Mr. Long was there and in charge of the section and of the section crew, the hands alone he hired them and fired them when he felt like it?

A. Yes, sir.

Q. That was the common practice?

A. Yes, sir.

Q. Do you recall when Mr. Long left or about how long it was that he left previous to the death of Bryant, on the occasion that he had been gone for a few days to his home?

A. I think he had been gone about three or four days but I can't tell you exactly, but about three or four days.

Q. Who was in charge, in his absence, of all the crew?

A. Dodson.

Q. Con P. Dodson?

A. Yes, sir.

Q. You mean the same man that afterwards shot Marshall Bryant?

A. Yes, sir.

Q. Were you working under him at that time?

A. Yes, sir.

Q. Were you taking orders from him?

A. Yes, sir.

Q. And were all of the other men on the Backbone section under him and taking orders from him during that period?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. He was the foreman in charge of all the section work, was he?

A. Yes, sir.

Q. And nobody else was there?

A. No, sir.

Q. Were you working on the Saturday previous to the death of Marshall Bryant, the Saturday before he was killed on Sunday morning?

A. Yes, sir, I was right there.

Q. Please state whether or not the crew was called out for an emergency wreck that night and Sunday?

A. Yes, sir, we were called out along about five o'clock that evening and on Sunday morning we were called back at seven o'clock.

Q. Was Mr. Dodson with you?

A. Yes, sir.

[fol. 46] Q. What was the nature of that work?

A. They just had a wreck down there and we went to straighten this wreck out.

Q. You mean clearing the track of the wreck?

A. Yes, sir.

Q. It wasn't like ordinary track work then?

A. No, sir.

Q. I mean ordinary repair work. Now was Mr. Con Dodson in charge of you?

A. Yes, sir.

Q. He was there present, was he, on Sunday?

A. Yes, sir.

Q. Was Marshall Bryant present or working either on Saturday night or Sunday?

A. No, sir, he wasn't there.

Q. Were you present on Monday morning when the crew was starting to work from the toolhouse at Backbone?

A. Yes, sir.

Q. Were you present there?

A. Yes, sir.

Q. Do you know about what time you got there that morning?

A. Yes, sir, I got there about ten minutes to seven.

Q. And you went to work at what time?

A. Seven o'clock, we were due to be at the toolhouse.

Q. This toolhouse that you refer to, was that over and adjacent to the tracks of the railroad company, I mean was it close to the tracks?

A. Yes, sir, it was close to the tracks.

Q. The little toolhouse set right by the side of the tracks, didn't it?

A. Yes, sir.

Q. And on the right of way of the company?

A. Yes, sir.

Q. That is where you kept the hand car and other tools that were used to repair the track with?

A. Yes, sir.

Q. Who else was there besides you on the occasion on that Monday morning when Marshall Bryant was killed?

A. There was several of us there, my brother Frank Wright and Sonny Wright.

Q. That is the man who has just testified?

A. Yes, sir.

[fol. 47] Q. He wasn't present right at the place of the killing, was he?

A. No, sir, and Marshall Wright, he was there.

Q. He is not here now, he is in West Virginia somewhere isn't he?

A. Yes, sir, and Hazel Wright, Marshall's wife was there, and Jim Down, he was there and Taylor Thompson, he was there.

By Mr. Perry:

Q. You mean his wife was there when he was killed?

A. Marshall Wright's wife was there right at the house.

By Mr. Stephenson:

Q. Who else was there, was John Pierce and John Price, were they there?

A. Yes, sir.

Q. Now just tell the Court and jury what occurred after that, after Marshall Bryant came there that morning, you were there when he came, were you not?

A. Yes, sir.

Q. Now tell the Court and jury what occurred when he came.

A. When he got there he went into the toolhouse, he started into the toolhouse to get his pick and Dodson said to him "fellow, I don't need you any longer," and Marshall, he went on in and got his pick, he must not have understood him, he went in and got his pick and came back out and set it up on the lever car, and he said to him "fellow——

Q. Who said it?

A. Dodson said to him "fellow, I don't need you any longer," and then Marshall Bryant says "well, I am due to get my money in six hours after I quit," and he went on and got his bucket and he set it up on the car and he says "I will go and see Mr. Long," so Dodson says "fellow, I have just fooled with you long enough, you get away from here," and he just reached around in his pocket like that (indicating) and got his gun out and put it on him.

Q. Put it on him?

A. Yes, sir.

Q. On who?

A. On Bryant.

Q. You mean pointed it at him?

[fol. 48] A. Right like that (indicating) and Bryant says "what are you going to do with that," and I never did understand what Dodson said to him, but about that time he says "I am going to make you eat it."

Q. Who said that?

A. Bryant, and about that time the gun went to firing.

Q. Who was holding it?

A. Dodson.

Q. You say the gun went to firing?

A. Yes, sir.

Q. And was it fired in the direction and did it strike Marshall Bryant right there?

A. Yes sir, it struck him.

Q. You were right there, right close to him?

A. Yes, sir, I seen the smoke hit him.

Q. Now Mr. Wright where were they when that happened?

A. Marshall Bryant was standing at the end, the east end of this lever car and Dodson was standing right over about like you are sitting there, say this is the east end here (indicating).

Q. Say this is the east end, that is heading down towards Covington?

A. Yes, sir.

Q. And this was just a little lever car?

A. Yes, sir.

Q. And Marshall Bryant was standing at the end of that, in between the tracks?

A. Yes, sir.

Q. The lever car was setting on the tracks?

A. Yes, sir.

Q. That was one of the main tracks of the railroad company?

A. Yes, sir, that was the west bound track.

Q. And where was Mr. Dodson?

A. Standing just the same as you are standing there, say this was the lever car and he was standing on that side just like you are there.

By Mr. Perry: You mean three or four feet——

By Mr. Stephenson: Wait a minute, Mr. Perry, I will get at that.

Q. Here was Marshall Bryant standing at the end of that lever car between the tracks?

[fol. 49] A. Yes, sir.

Q. And Mr. Dodson, the foreman, was standing on the left hand side of the track if he was facing towards Covington?

A. Yes, sir.

Q. And on the side of the lever car?

A. Yes, sir.

Q. And about what distance away?

A. About three feet away from him. The lever car is about six foot, I think the lever car is but I won't say for certain, but I believe that is about what they are, about six feet, and he was on the side of the lever car.

Q. He wasn't in reach of him, was he?

A. No, sir.

Q. You really don't know the length of the lever car?

A. No, sir, I don't know that.

Q. Was Mr. Dodson towards or near the other end of the lever car?

A. No, sir, my recollection is he was standing about middle-ways of the lever car.

Q. They were separated by some little distance then?

A. Yes, sir.

Q. And the car was between them?

A. Yes, sir.

Q. Now at that time, and you have detailed the facts, and Mr. Dodson had brought out that gun and told him he meant for him to leave there as you have stated, haven't you?

A. Yes, sir.

Q. Did Mr. Bryant have anything to attack Mr. Dodson with or was he attempting to attack him in any way?

A. No, sir, he didn't have anything.

Q. Are you positive of that?

A. Yes, sir.

Q. Was he trying to get around that lever car?

A. No, sir.

Q. Was he making any effort to get hold of Dodson?

A. No, sir.

Q. Nothing of that sort occurred?

A. No, sir.

Q. And he had nothing in his hands?

A. No, sir, nothing in his hands.

Q. Are you positive of that?

[fol. 50] A. Yes, sir.

Q. Do you know whether he was bare handed, or not?

A. No, sir, he had his gloves on?

Q. Marshall Bryant had his gloves on?

A. Yes, sir.

Q. And he made no motion as if to draw any weapon or anything of that kind, you say?

A. No, sir.

Q. He was standing there with his hands down by his sides, or what?

A. Yes, sir.

Q. And made no advance towards Dodson?

A. No, sir.

Q. That is the way you saw it, is it?

A. Yes, sir.

Q. You have no interest in this matter?

A. No, siree, I haven't.

Q. You are still employed by the railroad company, aren't you?

A. No, sir I aint working for them now.

Q. But you had been a regular employee and you did work for them after that?

A. Yes, sir.

Q. That is Mr. Marshall Bryant that was taken away from there and taken to the hospital at that time?

A. Yes, sir.

Q. That is the same Marshall Bryant?

A. Yes, sir.

Q. And he subsequently died?

A. Yes, sir, that is the same one.

Q. He shot him several times I believe?

A. Yes, sir.

Q. Now Mr. Wright, you knew Con Dodson, didn't you?

A. Yes, sir, I knew him personally while I was there.

Q. You had been working for him for sometime?

A. Yes, sir.

Q. I want you to tell this Court and jury what kind of a man he was with regard to temper and temperament?

A. Well, he was a man like this, he would fly up, he was kinda flighty and would fly up where I didn't think he had any business doing it.

Q. He was quick to fly up?

A. Yes, sir.

[fol. 51] Q. And had a quick temper?

A. Yes, sir.

Q. Was he, or not, an irritable man?

A. They say there was something wrong with him, but I don't know.

By Mr. Perry: I object to the answer and move to strike it out.

By the Court: He said there was something the matter with him and if he knows there was anything the matter with him he can testify to that. Mr. Morris read the question, or read the answer again. (Answer read to the Court.)

By Mr. Curry: That is the very thing the railroad company was expected to know.

By Mr. Perry: I object to that statement in the presence of the jury.

By the Court: I will overrule the objection.

Defendant excepts.

By Mr. Stephenson:

Q. Was it commonly or generally known that he was that sort of a man?

By Mr. Perry: I object to that question.

By the Court: I think you ought to lay the foundation whether this man, Mr. Wright, knew what his general reputation was.

By Mr. Curry: And having something wrong with him.

By Mr. Stephenson:

Q. You have stated he was a man of a flighty and quick tempered and irritable. Did he have the capability of getting along peaceably and amicably with the men that he was working with?

[fol. 52] A. No, sir, he did not.

Q. Was that his general reputation, or not, with reference to these matters you have testified to?

By Mr. Perry: I object to that.

By Mr. Stephenson: Wait until I finish the question.

Mr. Perry: I want to object now. You have not asked what the Court indicated you could ask.

By Mr. Stephenson:

Q. Did you know the general reputation amongst the men with whom Dodson worked there and with whom he worked, you and the other men that he worked with as to this ques-

tion of whether he was an irritable and flighty and quick tempered, do you know his reputation and what they thought of him?

A. Yes, sir.

Q. Was that his reputation?

A. Yes, sir.

Q. And did he have the reputation of being a man that did not get along amicably with other men?

A. Yes, sir.

Q. I am speaking with reference to people he worked with, people that worked under him and for him. That is what you mean, is it?

A. Yes, sir, I know what you mean.

Q. Did he have a violent, stubborn kind of a temper?

Objected to. Sustained.

Cross-examination.

By Mr. Perry:

Q. How long had you worked on that section at the time this happened?

A. Something close to twelve months.

Q. In your work were you under Long?

[fol. 53] A. Yes, sir, I was under Long.

Q. What part of that time, if any, did you work under Dodson?

A. When Mr. Long went away, he goes away and goes off and when he does that he left him in his place.

Q. When did he go away and leave Dodson in his place?

A. I just don't remember when he went away.

Q. It was some days before the killing, wasn't it?

A. Yes, sir.

Q. What work had you been doing during the preceding week?

A. Working on the section, track work.

Q. I know, but what kind of track work, were you with the rest of the gang?

A. Yes, sir, I was with Mr. Long's gang.

Q. You all were doing silling I believe?

A. Yes, sir.

Q. How many men were in that gang?

A. I don't remember, I cannot tell you.

Q. There was more than was usually the case at that time, wasn't there, because you were doing very heavy work, were you not?

A. Yes.

Q. Did you ever personally have any trouble with Dodson?

A. No, I never had any trouble with him.

Q. Dodson was working there when you got there?

A. Yes, sir.

Q. At the time that Long put him in to act as foreman and Long went away, Dodson was working with the rest of the gang with that silling business?

A. No, sir.

Q. What was Dodson doing at that time?

A. He was working above there.

Q. He had finished that work above there, the cutting of the right of way, hadn't he?

A. Yes, sir, and he was putting in a few ties up along there.

Q. How far away?

A. I don't know that, I cannot tell.

Q. In sight?

A. No, sir, he wasn't in sight.

Q. And Long brought him down and put him in charge?

A. Yes, sir.

Q. Did you hear any row between Marshall Bryant and Dodson on Saturday?

[fol. 54] A. No, sir, I didn't hear that.

Q. Were you working anywhere near them?

A. Yes, sir, I was working up above and amongst them, but I never heard a word out of them at all.

Q. On Monday when this shooting occurred, as I understand, Bryant came in like he was going to work?

A. Yes, sir.

Q. Did he bring his bucket and lunch with him?

A. Yes, sir.

Q. Where was Dodson when Bryant came on the right of way?

A. Dodson was right there at the toolhouse.

Q. Did Bryant come up to the toolhouse or go to the tool car?

A. He went to the tool house.

Q. Then what was it that Dodson said to Bryant?
A. He said "fellow, I don't need you any longer."
Q. That is the first thing that Dodson said to Bryant?
A. Yes, sir.
Q. "Fellow, I don't need you any longer"?
A. Yes, sir.
Q. What did Bryant say?
A. Bryant said "well, I generally get my money in six hours after I quit."
Q. Did Dodson say anything about already having fired him?
A. No, sir, he never said a word about that.
Q. He just said "fellow, I don't need you any longer."
A. Yes, sir.
Q. When Bryant said "I generally get my money in six hours after I quit," what did Dodson say?
A. Dodson said "fellow—" I just don't remember what he did say, but any way he said "fellow, I have fooled with you as long as I am going to fool with you."
Q. Didn't Bryant say that he was going to see Mr. Long?
A. Yes, sir, but that was after that.
Q. Dodson then said "fellow, I have fooled with you as long as I expect to fool with you," or something like that?
A. Yes, sir.
Q. Now, go ahead, what else did they say. Then what did Bryant say?
A. Bryant made a reply to him, but after he said that he just reached out in his pocket and pulled out his gun.
Q. What was it Bryant replied to him, don't you know what Bryant said?
[fol. 55] A. No, I don't know what he said to him.
Q. Then it was that Dodson reached around for his gun?
A. When Dodson reached around and got his gun and put it on him he asked him what he going to do with that. I understood what he said then.
Q. And what did Dodson say?
A. Bryant said "I will make you eat that."
Q. Bryant said that?
A. Yes, sir.
Q. And about that time the shooting took place?
A. Yes, sir.

Q. And nothing more than that was said?

A. No, sir.

Q. Did you hear Bryant tell Dodson that he was going to give him what he promised him?

A. No, sir.

Q. You don't know whether he said that, or not?

A. No, sir.

Q. How many men were standing around at that time?

A. I don't remember that, I can't remember that.

Q. How far was the toolhouse from where you all were going to work that morning?

A. Something like a mile.

Q. You were going back to the same place you had worked at on Saturday?

A. Yes, sir.

Q. And after Dodson did this who took charge of the gang?

By Mr. Stephenson: I object to that.

(Question withdrawn.)

By Mr. Stephenson:

Q. What size man was Marshall Bryant and about what would he weigh?

A. The man would weigh I guess 140 or around that.

Q. About what size man was Dodson in comparison with Bryant?

A. I suppose he would weigh around about that, about 135 or 140 pounds.

Q. Was Bryant a good work hand?

A. Yes, sir, I never seen anything the matter with his work.

[fol. 56] Q. In regard to the question of size, I believe Dodson was a taller man than Bryant?

A. Yes, sir, Bryant was a low heavy set man.

Q. What wages did Marshall Bryant make?

By Mr. Perry: I object to that. Certainly this witness is not competent to tell what wages the other men made.

By the Court: If he knows he can state it, he may have seen the money paid to him.

By Mr. Perry: If he did that it would be all right.

By Mr. Stephenson:

Q. Do you know what wages he was making?
A. No, sir, I don't know that.
Q. Was he in the same kind of work that you were?
A. Yes, sir.
Q. You were doing exactly the same work that he was and worked the same hours?
A. Yes, sir.
Q. And what did you make?

Objection. Overruled. Exception.

A. $2.96 a day.
Q. When was it that Dodson said to Bryant "I have fooled with you as long as I am going to, and I want you to get away from here," or words to that effect. When did that happen?
A. That happened that morning.
Q. In that conversation?
A. Yes, sir.
Q. Was that immediately or shortly before he was shot?
A. Yes, sir, about the time he shot him.
Q. He told him he wasn't going to fool with him and wanted him to get away, or something of that kind.
A. Yes, sir.

Witness stands aside.

[fol. 57] FRANK WRIGHT sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is Frank Wright?
A. Yes, sir.
Q. You were raised in this county, were you?
A. Yes, sir.
Q. You are a brother of Sam Wright who has just testified?
A. Yes, sir.
Q. Were you employed on the Backbone section by the Chesapeake & Ohio Railway Co. shortly previous to the death of Marshall Bryant?

A. Yes, sir.

Q. You had not been there very long?

A. No, sir.

Q. About how long?

A. I hadn't been there more than a couple or three months, or somewhere along there.

Q. Are you working there now?

A. Yes, sir.

Q. You are still working on the section?

A. Yes, sir.

Q. Were you present on the Saturday previous to the day on which Marshall Bryant was killed, I mean the Saturday before the Monday?

A. Yes, sir.

Q. Who was in charge of the men from about the middle of the previous week up until the time that Marshall Bryant was shot by Mr. Dodson, who was in charge of the men?

A. Dodson was running us.

Q. Dodson was the man in charge?

A. Yes, sir.

Q. Mr. Long, the regular foreman was gone, was he?

A. Yes, sir.

Q. Were you present at the toolhouse on Monday morning when the shooting occurred?

A. Yes, sir.

Q. Were you pretty close to it?

A. Yes, sir.

[fol. 58] Q. Had you been out and worked the Sunday previous?

A. Yes, sir.

Q. And Saturday night before Sunday?

A. Yes, sir.

Q. Who was in charge of you?

A. Dodson, he was in charge of us.

Q. What were you doing?

A. We came down here to a wreck.

Q. You were cleaning up a wreck?

A. Yes, sir.

Q. On the main line of the Chesapeake & Ohio Railway?

A. Yes, sir.

Q. Was Marshall Bryant along either time?

A. No, sir.

Q. He was not along?

A. No, sir.

Q. Now on Monday morning where did you start from, where did you start from to go to your work, from what point?

A. We started from the toolhouse up at the west end of the section to work where we worked the Saturday before that.

Q. You started from the Backbone toolhouse?

A. Yes, sir.

Q. The tool house was close to the track, wasn't it?

A. Yes, sir.

Q. What was the first that you heard of the difficulty between Dodson and Bryant?

A. I never heard anything only on Saturday before I heard Dodson say "you keep on yapping around here you wont have anything to do," and that was on Saturday before the shooting occurred on Monday morning.

Q. You heard that on Saturday?

A. Yes, sir.

Q. "If you keep on yapping around here you wont have anything to do?"

A. Yes, sir.

Q. Was Bryant a good hand, or not?

Objection. Overruled.

Q. Was he a good industrious man, or not?

A. Yes, sir, he done as good as the rest of them out there.

Q. He did as good work as anybody did on the shift?

[fol. 59] A. Yes, sir.

Q. Was there any reply made to that statement that you heard on Saturday by Bryant to Dodson?

A. No, sir.

Q. You didn't hear any reply?

A. No, sir.

Q. He did not come out and work Saturday evening and Sunday?

A. No, sir.

Q. Now on Monday morning when you went to the toolhouse what was the first thing you knew of any difficulty there?

A. All I heard was when he stepped up into the toolhouse there I heard Dodson say to Bryant "I ain't got anything more for you to do."

Q. He was stepping in towards the toolhouse?

A. Yes, sir.

Q. And at that time Dodson said to Bryant "I haven't got anything more for you to do."

A. Yes, sir.

Q. "Haven't got anything for you to do?"

A. Yes, sir.

Q. Then what happened after that, tell the Court and jury the way it occurred and what you saw?

A. When Dodson told him that Bryant, he just walked on to the toolhouse and got his pick and walked on out to the car and put it on the car.

Q. Did he have his dinner bucket with him?

A. Yes, sir, he put his dinner bucket and pick on the car.

Q. Where was the car?

A. It was setting on the west bound track.

Q. It was setting on the rails ready to start off?

A. Yes, sir.

Q. It was starting time, wasn't it, 7 o'clock in the morning?

A. Yes, sir.

Q. Now what occurred then after he had put these things on the car?

A. He told him again that he told him he didn't have anything more for him to do.

Q. Mr. Dodson told him that?

A. Yes, sir and so Bryant never said anything right then, and he said "I told you to get on away from here."

Q. Who said that?

[fol. 60] A. Dodson, and Bryant, he never went right then, and Dodson he went to get his gun then.

Q. Where did he reach to get his gun?

A. He went and got it in his hip pocket.

Q. Bryant did not get away when he told him to?

A. No, sir, he was standing there.

Q. Had he made any attempt to attack Mr. Dodson in any way shape or form or fashion?

A. No, sir, not a thing.

Q. Any movement towards him?

A. No, sir.

Q. Did he make any motion towards his pocket as if to get a weapon or anything of that kind?

A. No, sir, he had his gloves on.

Q. Did he have anything in his hand?

A. No, sir, except he had his gloves on.

Q. Where were his hands?

A. Down by the side of him.

Q. That car was standing on the track and where was Bryant standing with reference to the end of the car?

A. He was standing about middle ways of the lever car.

Q. On the end of it?

A. Yes, sir, on the east end.

Q. Now let us take this table as the lever car, and call that end towards Covington.

A. Call that the east end and this the west end, and he was standing down at the east end, Mr. Bryant was, and Dodson was standing just about by the side of the car like you are standing.

Q. And what about the distance between them?

A. Just about like that.

Q. About like the distance from the end of that able to where I am now standing?

A. Yes, sir.

Q. Something like 6 or 7 feet do you think, is that correct?

A. Yes, sir.

Q. And the conversation that you have narrated took place right between them leading up to the shooting?

A. Yes, sir.

Q. And they were in that position?

A. Yes, sir.

[fol. 61] Q. Immediately previous to the drawing of the gun by Mr. Dodson,—you saw him draw the gun, did you?

A. Yes, sir.

Q. Immediately previous to that had Marshall Bryant done anything to indicate that he was going to attempt to come around that lever car to attack him or anything of that kind?

A. No, sir.

Q. He was standing there with his gloves on ready to go to work?

A. Yes, sir.

Q. Had Mr. Dodson told him to get away or anything of that kind?

A. No, sir, he told him before that, and he shot him after he pulled his gun out.

Q. He was standing right there when he shot him?
A. Yes, sir.
Q. In the manner you have indicated?
A. Yes, sir.
Q. And he told him to get away and he just pulled his gun out and shot him?
A. He told him to get away, he said "I told you to get away," and Bryant never went.
Q. He shot him several times?
A. He shot him once right here (indicating) and once in the arm here and here (indicating).
Q. Was that the same Marshall Bryant that was immediately after that taken away from there and taken to the C. & O. hospital?
A. Yes, sir.
Q. Where he ultimately died, but that is admitted here?
A. Yes, sir.
Q. Have you any interest in this case?
A. No, sir.
Q. Are you any kin to any of the parties?
A. No, sir.
Q. And your brother is not kin or related to them? and neither is G. T. Wright, who has testified here?
A. No, sir.
Q. You are still in the service of the Chesapeake & Ohio Railway Co.?
A. Yes, sir, I am still on the job.
Q. This man Bryant you had only known just a short time?
A. Yes, sir.
[fol. 62] Q. And Mr. Dodson you hadn't known so very long?
A. No, sir.

Cross-examination.

By Mr. Perry:

Q. You testified before the Justice of the Peace at the preliminary hearing, didn't you, when Dodson was arrested?
A. Yes, sir.

Q. That occurred a few days after the shooting?

A. Yes, sir.

Q. Now wont you tell the jury just what happened on Saturday evening about quitting time, I believe you said Dodson said to Marshall Bryant "if you keep on yapping around here you wont have anything to do"?

A. Yes, sir, he said that to Bryant.

Q. Did Bryant at that time make any reply?

A. No, sir, he never raised up.

Q. After that did you see Bryant and Dodson talking together?

A. No, sir.

Q. You didn't hear anything else that occurred that day?

A. No, sir.

Q. Now on Monday morning the first thing I believe was Bryant came toward the toolhouse like he was going to work?

A. Yes, sir.

Q. And Dodson says, "I aint got anything for you to do."

A. Yes, sir, that is what he said.

Q. Now what was Bryant's reply, or did he say anything?

A. He never said a word.

Q. He didn't seem like he heard it?

A. I don't reckon he did.

Q. But he went on into the toolhouse?

A. Yes, sir.

Q. Then Bryant came out of the toolhouse with a pick. Is that right?

A. Yes, sir.

Q. And he brought that and put it on the car?

A. Yes, sir.

Q. Where was Dodson at that time?

A. He had walked over to the side of the lever car then.

[fol. 63] Q. Dodson was over beside the car?

A. Yes, sir.

Q. Did Bryant put his pick on the tool car, or not?

A. Yes, sir.

Q. Then what did Bryant say or what did Dodson say?

A. Dodson told him to go on away and Bryant never went.

Q. Did you hear Bryant say anything about "I will get the money that is coming to me in six hours," or anything of that sort?

A. No, sir, I never heard that.

Q. Do you remember hearing Bryant say to Dodson just at that time "I will give you what is coming to you this morning"?

A. Yes, sir, I heard that.

Q. You heard him say that?

A. Yes, sir.

Q. Bryant said "I will give you what is coming to you this morning"?

A. Yes, sir.

Q. He was talking to Dodson?

A. Yes, sir.

Q. Was that before Dodson pulled his gun, or not?

A. That was before he pulled his gun.

Q. Then what did Dodson say to that?

A. He got his gun then, when he told him that.

Q. And then Bryant said "I will make you eat that up"?

A. Yes, sir, he said "I will make you eat that damn thing."

Q. So the way the thing happened as you remember it is, first Dodson says "I told you I didn't have anything more for you to do." That is right, isn't it, or words to that effect?

A. Yes, sir.

Q. Then Bryant said to Dodson "I will give you what is coming to you this morning"?

A. Yes, sir, that is what he said.

Q. And then Dodson said "I told you to get on away from here"?

A. Yes, sir.

Q. And pulled his gun?

A. Yes, sir.

Q. Was that when he pulled his gun?

A. How is that?

Q. Dodson then said "I told you to get away from here"?

A. Yes, sir.

Q. Was that when Dodson pulled his gun?

A. No, sir, he never pulled his gun until Bryant told him he would give him what is coming to him.

[fol. 64] Q. Then he pulled his gun?

A. Yes, sir.

Q. Didn't Dodson say "I told you to go away from here"?

A. No, sir, he said that before, and then Bryant spoke up and said "I will give you what is coming to you this morning."

Q. And then he pulled his gun?

A. Yes, sir.

Q. And then Bryant said "I will make you eat that thing up," or something to that effect?

A. Yes, sir.

Q. And then the shooting began?

A. Yes, sir.

By Mr. Stephenson:

Q. After Mr. Dodson had pulled out his gun, and had it drawn on Bryant, he made the remark, "I will make you eat that thing"?

A. Yes, sir.

Q. In other words, Dodson was standing here something like I am with a gun drawn on him?

A. Yes, sir.

Q. And Bryant was standing there doing nothing except he said "I will make you eat that thing"?

A. Yes, sir.

Q. And you tell the jury positively that he was unarmed, and made no effort to strike him?

A. He was not armed, he didn't have anything.

Q. He made no effort to reach for anything on the hand car or any place else?

A. No, sir.

Witness stands aside.

Taylor C. Thompson sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Were you working on the section at Backbone at the time of the killing of Marshall Bryant and previous thereto?

A. Yes, sir.

[fol. 65] Q. On Monday, August 31st, 1925?

A. Yes, sir.

Q. How long had you been working there?

A. I had been working there about eight or ten months or pretty close to that, I don't know just exactly how long.

Q. Maybe a year?

A. Yes, sir.

Q. But you are not sure?

A. No, sir.

Q. Your father also worked there?

A. Yes, sir, he had been working there about a year before I went there.

Q. You are a married man?

A. Yes, sir.

Q. You knew Marshall Bryant, did you?

A. Yes, sir.

Q. Was he a married man?

A. Yes, sir.

Q. Was he living there near Backbone?

A. Yes, sir, he was living up right above the tank.

Q. What family did he have?

A. Him and his wife and his little boy.

Q. Did he have one or two children?

A. I don't remember.

Q. But you knew that he had one?

A. Yes, sir.

Q. A small child, was it?

A. Yes, sir.

Q. His wife is here I believe, isn't she, today?

A. Yes, sir.

Q. He was a young man, or what age was he, do you know, approximately?

A. He was about 23 or 24 or 25 maybe, I don't know just what his age was.

Q. About what size and weight man was he?

A. He was a kind of a low heavy set fellow and he looked like he weighed about 140 pounds.

Q. He was a low built man?

A. Yes, sir.

Q. You knew Mr. Dodson, didn't you?

A. Yes, sir, I knew him after I moved up there.

Q. About what weight man was Mr. Dodson?

[fol. 66] A. He was tall and slim and he was about the same size of Mr. Bryant, I reckon there was not much difference in them.

Q. About the same weight you mean?

A. Yes, sir, he was taller than Mr. Bryant but he wasn't as heavy.

Q. They were men about equal size and strength then?

A. Yes, sir.

Q. Mr. Long, I believe, was the regular section foreman there in charge of that section, wasn't he?

A. Yes, sir.

Q. And Mr. Dodson, when was he in charge of the force, if at all?

A. He had been in charge of the force and they had been cutting some of the right of way off the same week on the upper end, probably a month before he had charge of the whole force, he had a few men up there working.

Q. He had a few men under him separate from Mr. Long, you mean?

A. Yes, sir, and while Mr. Long's mother was sick the whole force was left to him then, he worked them all then, while Mr. Long was away.

Q. Those were the days preceding the shooting of Mr. Bryant?

A. Yes, sir.

Q. Was Mr. Dodson the only foreman at that time?

A. There was an extra force in there at that time but Mr. Wickline had charge of that force.

Q. I mean the force you were working on, was he the only man in charge in the absence of Mr. Long?

A. Yes, sir.

Q. And did he direct the operations of that force while Mr. Long was gone?

A. Yes, sir.

Q. And have control of it?

A. Yes, sir.

Q. Were you present on the morning of August 31st, Monday morning when Marshall Bryant was killed?

A. Yes, sir, I was there that morning.

Q. You were there with the other men, what were you getting ready to do?

A. We were getting ready to go to work that morning.

Q. You were just starting to work?

A. Yes, sir.

[fol. 67] Q. It was about time for work to begin, wasn't it?

A. Yes, sir, about seven o'clock.

Q. Had the car been placed on the track by you men, or some of you?

A. Yes, sir.

Q. Before this difficulty occurred?

A. Yes, sir.

Q. Were you pretty close to Mr. Bryant when this difficulty did occur?

A. I was standing right by the side of him when he was shot, we were both standing up between the two rails on the west track.

Q. You were on the same end of the track that he was?

A. Yes, sir.

Q. About how far away was Dodson at that time when he shot him?

A. He was something probably about eight or ten or maybe 12 feet, just across the car.

Q. And where was Mr. Dodson standing, was he at the end or the side of the car or where was he?

A. He was at the side of the car.

Q. Which side?

A. He was on the right hand side going up, on the west track.

Q. That would be the left hand side coming east?

A. Yes, sir.

Q. And he was on the north side of the track?

A. Yes, sir.

Q. Was that the west bound track that the car was on?

A. Yes, sir.

Q. Now say this was the lever car, this table, he was on this side of it, if this table was the lever car, he was on this side of it and Mr. Dodson was facing east and this was the east end of it (indicating)?

A. Yes, sir.

Q. And Bryant was standing over there and you were standing by the side of him?

A. Yes, sir.

Q. Now just tell the Court and jury what took place there, what you saw take place and heard at that time?

A. I live right above the toolhouse, and I always waited until Mr. Dodson came down going down to the toolhouse and he went by and I went to the toolhouse to unlock the toolhouse, and we set the lever car on and was getting the tools out.

[fol. 68] By Mr. Perry:

Q. On which track did you set the lever car?

A. On the west track and Mr. Bryant he came down and he stopped when he got to the end of the car and he set his dinner bucket down and went to the toolhouse to get his pick or shovel or some kind of a tool and he brought it back and put it on the car and picked his dinner bucket up and set it on the car and walked behind the car and Mr. Bryant and I were going to get on the hind end of the car, we were just ready to step on the rear end of the car and Mr. Dodson was over on the side the brake was on, he always rode over there, and he was standing over by the side of the car and he told him when he came down to set his bucket down that he wouldn't work him any longer.

Q. Mr. Dodson told Bryant that?

A. Yes, sir, and they were getting ready to get on the car and he told him, he said "I told you, Bryant, I wouldn't work you any longer," and Bryant said "where is Mr. Long," and he said "he is over at the house in bed, or he was when I left," he had been up with his mother, I think that night, and he said, "I will go over and see him," he said "he hired me and if he wants to fire me he can fire me," so we were going over and I reckon Mr. Dodson took his gun out of his pocket and told him "Bryant, I told you to get off the job, you get away from here."

By Mr. Perry: I ask the Court to strike out what the witness reckons.

By the Court: I think that is proper that he started, but he reckoned he was going on over there. I don't think that is incompetent.

Defendant excepts.

By Mr. Stephenson:

Q. Go ahead.

A. He asked him "what are you going to do with that thing."

Q. Who said that?

A. Mr. Bryant, and I don't remember whether Dodson answered him then, or not, but he shot at him and shot a couple of times and Bryant started to run and he kept his shot until he emptied his gun I suppose he shot five times, and Bryant ran around the toolhouse.

[fol. 69] By Mr. Perry: Never mind as to that.

By Mr. Stephenson: That is all right.

Q. Was the shooting immediately after he got his gun out, did he start to shoot?

A. Yes, sir.

Q. Immediately he drew out his gun?

A. Yes, sir.

Q. At that time you were standing on this side of the lever car?

A. Yes, sir.

Q. And you were standing right there by the side of Marshall Bryant, between the rails?

A. Yes, sir.

Q. And the lever car was on the westbound track?

A. Yes, sir.

Q. You were very close to him when it started?

A. Yes, sir.

Q. At that time was Marshall Bryant making any movement or attempting to attack Mr. Dodson in any way whatsoever?

A. No, sir, not as I could ever tell, he didn't have anything in his hand and he did not start towards him.

Q. You are positive of that?

A. Yes, sir.

Q. Did he make any motion as if to draw a weapon or anything of that kind?

A. No, sir, I never saw it.

Q. Where were Bryant's hands?

A. Bryant had his hands down like this (indicating) and had his gloves on.

Q. Down by his side?

A. Yes, sir, just like anyone would carry his hands.

Q. And he was not making any movement to take hold of any implement or anything of that kind, you tell the jury, was he?

A. No, sir.

Q. Nothing like that occurred and you were right there where you could see?

A. Yes, sir.

Q. Have you any interest in this case at all?

A. No, sir.

Q. You are not any kin to any of these people, are you?

A. No, sir.

[fol. 70] Q. You knew Mr. Dodson there, didn't you?

A. Yes, sir.

Q. You had been working for him for practically a year?

A. Yes, sir, but he had been working away from me while he was on the upper end and I was with Mr. Long.

Q. Was he an irritable man?

Question objected to.

By the Court: He can testify himself if you will frame your question properly.

By Mr. Stephenson:

Q. What kind of a man was Dodson with reference to the question of his temperament and general disposition?

A. He seemed to be a kind of a nervous fellow and I believe he would get sick, or something, he had a peculiar kind of a way that most people didn't like. Of course I got along with Mr. Dodson all right while I was there.

Q. But he had a peculiar way about him, you say, that people did not like?

A. Yes, sir, lots of people up there didn't like Mr. Dodson very much, he would get mad pretty easy at most anything.

Q. And flare up without much cause?

By Mr. Perry: I object to that because the witness has not said anything about his flaring up.

By Mr. Stephenson:

Q. You stated, I believe, that he complained of being sick, or something of that kind?

A. I don't know that he complained very much, but he didn't look like he might be well. Mr. Alfred said he eat a lot of bran and had indigestion.

By Mr. Perry: I object to that. Let the witness tell what he knows and not what other people told him.

By the Court: Yes.

[fol. 71] By Mr. Stephenson:

Q. You knew the people that he worked with there and that knew him in that community, the men on the works, you knew them all pretty well?

A. Yes, sir.

Q. Did you know his reputation in regard to the characteristics you have detailed as to nervousness &c?

A. He was nervous.

Q. Did you know his reputation, that is, what people thought about him in regard to that, what other men thought of him?

A. The other men thought the same.

Q. That is what was generally thought of Dodson touching the question of his temperament and disposition, is that right?

A. Yes, sir.

Q. It was a well known fact and known by everybody in other words?

A. Yes, sir.

Q. Did he have the reputation, or not, of being a man that could not get along pleasantly and amiably with other men?

By Mr. Perry: I object to the question.

By the Court:

Q. What was his reputation in that respect, Taylor, what was his general reputation, if you knew it, about getting along with his men that way, under him?

A. He got along with the men, with most of the men fairly well, but he would fall out with some of them pretty often, he would get mad pretty quick and of course the other men didn't ever bother him and I didn't bother him myself, what he said went and of course he was the foreman over

the other men most of the time, when Mr. Long wasn't there he was.

Cross-examination.

By Mr. Perry:

Q. Mr. Thompson, that Saturday before this killing were you working in the gang with Dodson and Bryant?

A. Yes, sir.

[fol. 72] Q. What were you all doing, what were you working at?

A. We were silling that morning and that evening we pulled up one rail that morning and that evening we pulled up one rail on the west track around the curve east of Moss Tunnel.

Q. Did you hear any words at all between Bryant and Dodson?

A. No, sir, I didn't hear any that evening.

Q. Did you hear any conversation between them?

A. No, sir.

Q. Did you see them talking together or anything of that sort?

A. No, sir, I never did except when Dodson would tell Mr. Bryant to do something.

Q. On Monday morning you were standing on the south side of the track in between the two rails and Bryant was at your right?

A. Yes, sir.

Q. More towards the north side between the rails, is that right?

A. Yes, sir.

Q. And there wasn't anybody between him and Dodson who was around on the side of the car?

A. Just the lever car between them.

Q. That lever car isn't more than five or six feet long, is it?

A. I don't know, about eight feet, I reckon.

Q. So they were not quite as far apart as six or eight feet?

A. They were, I would say, about eight or ten feet.

Q. They were in a distance where a man could hit the other man with a pick if he had a pick in his hand?

A. No, sir, he couldn't reach that far with a pick.

Q. So it must have been five or six feet any way?

A. Yes, sir.

Q. I wish you could try to remember exactly what each one of these men said. Dodson first said "I can't work you any longer," or "I told you I can't work you any longer," which did he say, do you remember?

A. He first said "Bryant, I can't work you any longer," and I don't know whether Bryant heard him, or not, he didn't say anything to him.

Q. And the next time he said "I told you I couldn't work you any longer."

A. Yes, sir.

Q. Do you remember Bryant saying anything about he would make him eat up that gun?

A. No, sir, I didn't hear that.

[fol. 73] Q. Do you remember Bryant saying anything about "I am going to give you what is coming to you this morning"?

A. No, sir, I never heard him say that. I heard some of them say that he said it, but I didn't hear it .

Q. Don't say what others said; you yourself did not hear it?

A. No, sir, I didn't hear it.

Q. I expect in a minute afterwards everything was excitement?

A. Yes, sir.

By Mr. Stephenson:

Q. This whole transaction happened very quickly, didn't it?

A. Yes, sir, pretty quick.

Witness stands aside.

JOHN L. PIERCE (col'd) sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Where do you live?

A. I live up about a mile of Backbone there.

Q. Near Backbone?

A. Yes, sir.

Q You have been living there for several years, have you?

A. Yes, sir.

Q. Are you working for the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. Are you still working for them?

A. Yes, sir.

Q. Were you acquainted with Mr. Con Dodson?

A. Yes, sir.

Q. How long have you known him?

A. I suppose it has been possibly five or six or maybe as many as ten years, in that neighborhood.

Q. You have been living up there in the same place that he lived and on the same work, were you not?

A. Where Dodson was?

[fol. 74] Q. Yes.

A. Yes, sir.

Q. Tell the jury what sort of a man Mr. Dodson was with reference to his temper and general disposition?

A. He was considered a quick tempered man, he was very quick in temper, he would take up little things sometimes that possibly wouldn't amount to anything much, he had that disposition and he was quick or nervous, or something, I don't know what the trouble really was, but he would fly off at little things that possibly wouldn't amount to anything much.

Q. He would take exception to little things you say?

A. Yes, sir.

Q. And was quick tempered?

A. Yes, sir.

Q. Did he, or not, get along with the men well that he worked with, or would he have little hitches with them?

A. He would have little hitches at times. Of course I never worked right direct with Mr. Dodson, but he had a little force up above me, I was below them ditching but I heard different men say about him.

By Mr. Stephenson: I am coming to that question.

By Mr. Perry: I object to that.

Q. Did you know generally the people that worked there on the force; and in the neighborhood that knew Dodson, you knew them, didn't you?

A. Yes, sir.

Q. You knew them well?

A. Yes, sir.

Q. And you know his general reputation as to whether or not he was quick tempered and an irritable man such as you have described and just what people thought of him, you know that?

A. Yes, sir, he was quick, no doubt about that.

Q. Now with the people that lived there with him, and worked with him, was that the general reputation he had amongst them, or not?

A. Yes, sir.

Q. There is no question about that, that was generally and commonly known by everybody?

A. Yes, sir.

[fol. 75] Q. He would fly up when there was no reason for a man flying up?

A. Yes, sir, lots of times he would.

Q. You say you were working along on a ditching job at the time, I mean previous to this killing, were you?

A. Yes, sir, previous to that.

Q. What time previous, a short time previous?

A. Yes, sir, just the day before this happened on Monday, I believe, and I was possibly called to the force on Friday or Saturday, I don't remember whether it was Friday or Saturday.

Q. Previous to that you had been working on the ditch?

A. Yes, sir.

Q. Did you work on that by yourself?

A. Alone by myself.

Q. But you were a part of the section crew?

A. Yes, sir.

Q. Now what was the practice with reference to the foreman hiring men on the job, the section foreman?

A. I don't know whether he had authority to hire, or not, I couldn't say about that.

Q. I am not asking you about authority, I say what did Mr. Long who was the foreman, generally do about hiring and firing men?

A. He had that power to hire and fire, Mr. Long did.
Q. Did he exercise it commonly and generally?
A. Yes, sir.

By Mr. Perry:

Q. You mean Mr. Long?
A. Yes, sir.

By Mr. Stephenson:

Q. That was the common practice?
A. Yes, sir.
Q. For a few days preceding the shooting of Bryant who was in charge of that section crew?

By Mr. Perry: Did you know; not what you heard now.
By Mr. Stephenson: I mean what he knows.

[fol. 76] A. You mean prior to the shooting?
Q. Yes, I mean three or four days immediately previous to the shooting, if you know who was in charge of the crew.
A. Dodson was in charge.
Q. Was there any other foreman in charge?
A. No, sir, I think not at that time.
Q. Mr. Long was away, wasn't he?
A. Yes, sir, he was sick I think.
Q. He had illness in his family or something?
A. Yes, sir.
Q. And previous to that period of three or four days when Mr. Long was away, had Mr. Long been away at other times, or not, on account of illness in his family, for a short time I mean?
A. Yes, sir, I think so.
Q. During a month, we will say, preceding the shooting of Marshall Bryant, had he been away at numerous times?
A. Of the same month?
Q. Yes.
A. I couldn't say, I don't remember that.
Q. I am not confining it absolutely to that month, I mean different times preceding that.
A. Yes, sir, at times he would be away.
Q. Then who was in charge in his absence?
A. Mr. Dodson had been looking after the men and kinda filling his place.

Q. And you have stated that one time Mr. Dodson had a force of his own?

A. Yes, sir.

Q. That was working separate and apart from Mr. Long's force?

A. Yes, sir.

Q. And was he working them at the same time that Long was working the other shift?

A. Yes, sir.

Q. Clearing off the right of way, I believe you said?

A. Yes, sir.

Q. Mr. Marshall Bryant lived there in the same neighborhood at Backbone, didn't he?

A. Yes, sir.

Q. His family lived there?

A. Yes, sir.

Q. How much family did he have?

A. A wife and two children.

[fol. 77] Q. Two small children?

A. Yes, one was a young baby.

Q. He had been working there on the section for sometime, hadn't he, or about how long?

A. I think Bryant must have came there sometime that summer.

Q. We will prove that by someone else, I don't know whether you know it or not.

A. I don't remember exactly what time he came there, no, sir.

Q. Was he a good hand to work?

A. Yes, sir, I considered him a good hand, a good able bodied man.

Q. You were present at the time of the shooting weren't you, or a part of it?

A. Yes, sir.

Q. Just tell the Court and jury what you saw and heard of it, at the time of the shooting?

A. This was on Monday morning. On Sunday we were at a wreck here at B. S. Cabin and coming in that evening we had wired our tools and kinda tied them together and we were ordered to load them on the train that evening and take them back to the toolhouse, so on Monday morning then there was a good many tools, several bunches of

them that was tied up together, and we was really fixing to leave the section house at that time and I said "won't you need those tools," and he said "yes, you better get them."

Q. Who was that?

A. Mr. Dodson. So I just stepped back in the toolhouse to get the tools and I found that they were wired up so I was down unloosening those tools at the time the talk was going on between him and Bryant, and the first words I heard was "get on away from here."

Q. You heard Dodson say that?

A. Yes, sir, and I continued to work with the tools, still I looked around to see who he had reference to, I didn't know who he had reference to, so at the time I got the tools loose then, and I don't remember what else was said at that time, but when I turned to start out of the toolhouse to the lever car with the tools I saw Dodson have a gun.

Q. What position did he have it in?

A. He had it up like this (indicating).

Q. Who was it pointed at?

A. At first I didn't really know because there was a crowd of men standing there, several of them, a good many of them standing there and I didn't know until Bryant spoke and said "What are you going to do with that," and I don't remember Dodson's remark, the thing caught me [fol. 78] uncertain and I don't remember the remark, but I know that Bryant said "I will make you eat that," so the shooting then started immediately.

Q. Immediately?

A. Yes, sir, immediately.

Q. Was Mr. Bryant at that time standing at the end of the car?

A. Yes, sir.

Q. And Mr. Dodson was over on the side?

A. Yes, sir.

Q. Like using this table, and that was the end towards Covington and Mr. Bryant was standing there at the end of the car and the other men were close around him?

A. Yes, sir.

Q. And Mr. Dodson was standing back here on the side, somewhere?

A. Yes, sir, near the upper end of the car.

Q. What was about the distance between the two men?

A. I hardly know what the length of those lever cars are, but they are not I don't suppose over five or six feet, or something in that neighborhood, but I wouldn't say positive.

Q. Do you think that was the distance between them, about?

A. Yes, sir, I could guess at it ordinarily, but I never measured one.

Q. How many men can stand on one of those cars and ride?

A. I have known them to have as many as ten or twelve, or maybe more.

Q. Now when that occurred, when you were attracted to it by hearing Mr. Dodson say to Bryant "I don't want you any more," I won't work you, or get away from here"?

A. Yes, sir.

Q. Your attention was then attracted to it, and you looked around and saw him with a gun?

A. Yes, sir.

Q. And you heard Bryant say, "What are you going to do with that?"

A. Yes, sir.

Q. And he said "he would make him eat it"?

A. Yes, sir.

Q. At that time was Marshall Bryant, the man who was subsequently shot, was he making any motion towards Mr. Dodson or attempting to attack him in any way whatever?

A. I didn't see any at all.

[fol. 79] Q. And you were where you could see?

A. Yes, sir.

Q. Did he make any move towards his pocket or anything of the kind to try to draw a weapon or anything of that sort?

A. No, sir, not that I seen.

Q. Was he standing there perfectly defenseless with his hands standing by his sides, is that true?

Objection. (Question withdrawn).

Q. What position was he standing in and how was he standing, I mean Mr. Bryant?

A. He was standing somewhat facing the car, he was at the east end of the car and Bryant was supposed to be at the west end.

Q. And where were his hands?

A. His hands seemed to be down like this (indicating).

Q. Did he at that time, or immediately afterwards or before, for that matter, have anything in his hands to hit Dodson with, or anything of that kind?

A. No, sir.

Q. Or attempt to take hold of anything?

A. He didn't have anything in his hands.

Q. You are positive of that?

A. Yes, sir, I am positive of that.

Q. Then you say immediately after that conversation which you have narrated, as to what Bryant said "what are you going to do with that, or I will make you eat it" Dodson commenced shooting?

A. Yes, sir.

Q. Was that the same Marshall Bryant that was taken away from there and taken to the hospital on that occasion and afterwards died?

A. Yes, sir, the same Bryant.

Q. These other men that have testified and are witnesses here were present at the time, weren't they?

A. Yes, sir.

Q. You have no interest in this matter?

A. No, sir—what do you mean?

Q. You have no interest in the outcome of this trial?

A. No, sir.

Q. You don't know Mr. Bryant's people at all, only what you saw of them there?

A. No, sir, I never saw them before, until he came there.

[fol. 80] Cross-examination.

By Mr. Perry:

Q. Before this thing happened how long had you been working for the railroad company?

A. Myself?

Q. Yes.

A. I suppose I had been there about nine years, or maybe before.

Q. And you always worked under Mr. Long?

A. Yes, sir.

Q. At the time when Mr. Long went away to see his mother, when his mother was sick, just before this shooting, did Mr. Long put you under Mr. Dodson or did you just continue to do what Long had told you to do?

A. I don't remember when he was away on account of his mother, but I suppose if it was anywhere close to that time, close to the time of the shooting, I don't suppose I was in the force because I was ditching along by myself.

Q. You were ditching by yourself, or for yourself?

A. No, sir, for the company, but I wasn't right in that force.

Q. You were not in the force that was silling?

A. No, sir.

Q. You were doing the same sort of work that Mr. Wright was doing?

A. Yes, sir, he was on one end and I was on the other.

Q. Who directed you to do that ditching work?

A. Mr. Long.

Q. You had nothing to do with Mr. Dodson at all?

A. Not a thing, no, sir.

Q. On the Monday when the shooting occurred it was your duty, I suppose, to go to the toolhouse and start out with the gang?

A. I had been ordered either on Friday or Saturday to come out with the gang.

Q. Who gave you that order, do you know?

A. Dodson told me that Mr. Long told him for me to come out with the force.

Q. Then Monday would be the first day that you would work with the force?

A. No, sir, I was there on Saturday and possible Friday, I won't say positively, but I know I was there on Saturday. [fol. 81] Q. Did you have any trouble with Dodson on Friday or Saturday?

A. No, sir.

Q. Dodson was a pretty good worker, wasn't he?

A. Yes, sir, he was a pretty good worker.

Q. Did you see Dodson have any trouble Friday or Saturday with Marshall Bryant?

A. No, sir.

Q. You didn't hear anything that took place between them on Saturday?

A. No, sir.

Q. Did you see them talking together, Bryant and Dodson, on Saturday?

A. No, sir, I did not.

Q. You spoke of Dodson having the reputation of being a quick tempered man, and flaring up over little things. Did you ever see him flare up over little things?

A. Yes, sir, I have.

Q. Tell me how.

A. He would take exception to most any little thing. Like the gang of men would be working and if they would stop a moment or anything like that, he would fly up and get angry.

Q. He would make them keep at work?

A. I couldn't say that he was so mean about that, but if there was anything touching him he would fly off.

Q. If they teased him he would fly off?

A. Just most anything and he would be that way with the foreman sometimes.

Q. Do you know anything about the relations between Bryant and Dodson, that is, whether they were friendly or unfriendly?

A. So far as I came to know anything——

Q. Not from what other people said now.

A. I won't state that then because I didn't hear any of that because I didn't happen to be with them.

Q. On the morning of the shooting you were leaning down in the toolhouse unwinding the wire from around the tools?

A. Yes, sir.

Q. And the first thing you heard was somebody that you supposed was Dodson telling somebody else to go on away from here?

A. Yes, sir.

Q. Was it in an angry voice, or how was it said?

A. He spoke it in this tone, he said "you get on away from here."

[fol. 82] Q. Did it sound as if he was angry, or not?

A. Yes, sir, it sounded like he meant it.

Q. But did it sound like a man that was very mad or a man that was just commanding somebody to go on away?

A. It was a strick command, I would take it.

Q. Was it just after that that you went out to see who it was?

A. After that?

Q. After you heard that?

A. When I heard this I was unloosening these tools.

Q. And you didn't go out until you got them loose?

A. No, sir.

Q. What did you hear next?

A. When I straightened up then, it wasn't much time, I just was unwinding the wires and was getting out when I first heard the remark, getting the tools loose, and there wasn't but merely a moment you might say.

Q. Did you hear Mr. Bryant say that Mr. Long had hired him and Long would fire him, or say anything about Mr. Long?

A. No, sir, I didn't hear that.

Q. Do you remember hearing Bryant tell Dodson that "I am going to give you what is coming to you today?"

A. No, sir, I didn't hear that.

Q. But you say that Dodson then pulled his gun?

A. Yes, sir.

Q. And you heard Bryant say "what are you going to do with that?"

A. Yes, sir.

Q. What did Dodson say to that?

A. I couldn't recall what Dodson said because I wasn't expecting anything and I didn't get every word of it.

Q. Then it was that Bryant said "I will make you eat that?"

A. Yes, sir.

Q. Did Bryant make any move then?

A. I didn't see any.

Q. He was facing Dodson?

A. Yes, sir.

Q. And the firing began right away?

A. Yes, sir.

[fol. 83] By Mr. Stephenson:

Q. You could have seen it if he had made any move?
A. Yes, sir.
Q. You were looking right at it?
A. Yes, sir.

Witness stands aside.

(At this point counsel for plaintiff read the deposition of Con. P. Dodson as follows.)

Con P. Dodson (by deposition).

Direct examination.

By Mr. Curry:

Q. Mr. Dodson, what is your age?
A. Forty-three the 5th of this coming December.
Q. Where did you live on the 31st day of August, 1925?
A. Backbone, Alleghany County, Va.
Q. How long had you lived there?
A. I had been there a little better than seven years.
Q. In whose employment were you on the 31st day of August, 1925?
A. C. E. Long was my superior.
Q. In whose employment were you at the time?
A. The C. & O. Railroad.
Q. How long had you been in the employment of the C. & O. Railroad Company at that time.
A. I had been there a little better than seven years.
Q. In what branch of the service were you employed?
A. In the maintenance of way.
Q. You were in the track hand service?
A. Yes, sir.
Q. Had you been in that service during the whole time you were employed by the C. & O.?
A. I had been on the carpenter force something like a year during that time. Of course, that had been quite a while before that.

[fol. 84] Q. What was your position in that service on the 31st of August?

A. I was acting as foreman at the time; had been for some time.

Q. How long were you assistant foreman?

A. I had been acting something like a year.

Q. Who was the chief foreman of your force?

A. Mr. C. E. Long.

Q. How many hands did you work under him?

A. I had around 25 at that time; between 20 and 25.

Q. During the year you acted as assistant foreman about what part of the time did you act as chief foreman?

A. Well now, Mr. Long was called away on Thursday evening—Thursday night on account of his mother being very low.

Q. Was that the only time you had acted as foreman?

A. No sir; I had a crew working at the time.

Q. What my former question was—you stated in your examination in answer to one of my questions that you had been acting as assistant foreman for about a year?

A. Yes, sir.

Q. What I want to know is during that year about what part of the time were you in command of a force of hands?

A. Practically all the time.

Q. Then do I understand that the force of hands which was employed there was divided and you worked some of them?

A. Yes, sir.

Q. And Mr. Long worked some of them?

A. Yes, sir.

Q. You worked, then, a divided force?

A. Yes, sir.

Q. Were you acquainted with Marshall Bryant?

A. Yes, sir.

Q. How long had you known Mr. Bryant?

A. I knew him for something like a year or better because he had been working there I suppose a year.

Q. Do you know whether Mr. Bryant had been discharged from the C. & O.'s service when he was mortally wounded?

By Mr. Perry: This question and any answer is objected to on the ground that the question is leading, that the witness is asked to state a conclusion of law, and that the wit-

ness' statements cannot bind the defendant in this case since they are made long after the occurrence.

Overruled. Defendant excepts.

[fol. 85] A. Yes, sir.

Q. When was he discharged?

A. He was discharged on Saturday.

By Mr. Perry: Same objection.

Overruled.

Q. On what day was the shooting?

A. On Monday morning.

Q. On the following Monday morning?

A. Yes, sir, the following Monday morning.

Q. Who discharged him from the C. & O.'s service?

A. I did myself.

Q. Did you have authority to do that?

By Mr. Perry: I object on the ground that the defendant cannot be bound by statements of this witness as to occurrences long prior to this time. His authority must be proven by other evidence.

Overruled.

A. Yes, sir.

Q. Did you have authority to hire and discharge hands?

By Mr. Perry: Same objection.

Overruled.

A. Yes, sir.

Q. Had you made any report to any officer of the company that you were going to discharge Marshall Bryant before you did actually discharge him?

A. Yes, sir.

Q. To whom did you report that?

A. The supervisor, Mr. L. E. Crance.

Q. Was he discharged or not with the approval of Mr. L. E. Crance?

By Mr. Perry: Objected to on the ground that the statements of this witness cannot bind the defendant, being made long after the occurrence in question.

[fol. 86] Overruled.

A. Mr. Crance made the remark—he said, "You know what to do."

Q. What is Mr. Crance's official position?

A. Supervisor.

Q. Of the C. & O. Railroad?

A. Yes, sir; Clifton Forge Division.

Q. What is the length of the division?

A. Clifton Forge to Hinton?

Q. Do I understand you to say that you discharged him then with the full approval of Mr. Crance?

A. Yes, sir.

Q. About what time of day did this shooting occur on Monday, the 31st of August?

A. About 7 o'clock.

Q. That was about the time that the force went to work?

A. Yes, sir; that was the hour they were to report.

Q. Did Marshall Bryant appear that morning to start to work?

A. Yes, sir.

Q. Did you tell him to leave or not?

By Mr. Perry: Objected to as leading.

Q. Did you say anything to him or not?

A. I told him I refused to work him, that I couldn't work him any more.

Q. Did you say anything to him or not about having discharged him on Saturday?

Mr. Perry: Objected to as leading

Overruled.

A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. What section of the railroad were you on?

A. I was—let's see——

[fol. 87] Q. The limits of it?

A. You mean the space of the track?

Q. Yes.

A. Four miles.

Q. You were on a four mile section right at Backbone, were you not?

A. Yes, sir.

Q. Had all of your work during your employment been in that section?

A. No, sir, I had been on the carpenter force.

Q. How long before this time had you been on the carpenter force?

A. I expect four years. I wouldn't like to say positive.

Q. About that?

A. Yes, sir.

Q. You were employed by Mr. Long, who was section foreman?

A. Yes, sir.

Q. The 25 men you spoke of were all on that particular section, were they not?

A. Yes, sir.

Q. They were your section force?

A. Yes, sir.

Q. What was your work? What did you do every day in the course of your work?

A. Well, it is the maintenance of way department. It would be quite a little job to mention everything a man has to go through with.

Q. You would see that the ballast was in shape, put new ballast on, replace ties, level track, clean the right of way—those were the principal duties, were they not?

A. Yes, sir.

Q. This force of 25 men that was being worked at that time was that the regular force or was that more than usual?

A. That was an unusually large force for the section.

Q. What work were you all doing during the preceding week?

A. We were silling.

Q. That is, putting in new ties?

A. Yes, sir; silling and shoving the track over; they were cutting and shoving the track over, reducing the curve.

Q. West of Backbone or east of Backbone?

A. West of Backbone.

Q. On the C. & O. railroad?

A. Yes, sir.

[fol. 88] Q. What work were you about to do that morning? The same work you had been doing?

A. No; we were going to lay steel.

Q. On the same section?

A. Yes, sir.

Q. How many men were to work with you that morning—August 31st?

A. I suppose if the crew had all come in it would have been around 20 to 25 men.

Q. Was your tool car on the track at the time the shooting took place?

A. Yes, sir.

Q. Whereabouts were you on the preceding Saturday when you discharged Bryant?

A. Right east of the tunnel.

Q. Was it after you came in from work and put up your tools or while on the section?

A. While I was out on the job.

Q. Now state just what occurred at that time?

A. I had pulled up my high rail and pulled the dip out of the west bound curve and gone back and pulled out the elevation. I picked up my level board and started off down the track. He walked up by the side of me and when I made my last pull I just said to the men, I said, "when you get that up bring your tools in and we will drop back." I walked down the track and he walked up beside me. He said "are you going to town this evening?" I said I had thought I would, and he just made the remark, he said "I want to see you when we get to the toolhouse. I am going to beat the hell out of you." I said "Marshall, I don't want any trouble with you," and I said "after this evening remember I don't work you any more." I said "You don't work any more after this evening."

Q. What was his reply?

A. He just made the remark, "if you cause me to lose my job, I will kill you."

Q. How long had you known Bryant?

A. He had been on the job something like a year.

Q. What brought this particular quarrel up at that time? Why did he come up to you? Had you had words with him?

By Mr. Curry: I object to the answer of the witness as this is not proper cross-examination of the witness and as to this line of examination the defendant is making this witness its own witness.

[fol. 89] By Mr. Perry: To which counsel replies that on direct examination the question was asked whether he had discharged Bryant and the circumstances of the discharge and these questions are competent if the preceding question on direct examination is competent.

Overruled. Plaintiff excepts.

A. Well, I feel that this man—I had to discharge another man that was working there, some relation to him, and he seemed to be kind of cool with me over that.

Q. Had you had any trouble about his work that day or the preceding day?

A. It seemed he was trying to create a disturbance with the other men. When I would say anything he would repeat it over after me.

Q. What did he tell you after you told him you wouldn't work him any more on this Saturday?

A. He told me—made the remark I have just given.

By Mr. Curry: Same objection.

Overruled.

Q. Was anything further said at that time?

A. No, sir; I never spoke another word to him.

Q. How long after that was it that you all went back to the toolhouse?

A. That was—must have been something like an hour or an hour and a half.

Q. Did anything further occur between you and Bryant that evening?

A. No, sir; not a word.

Q. When did you report to Supervisor Crance—Crance was supervisor, wasn't he?

A. Yes, sir. I did that right that afternoon while this work train was there. I think he left on the work train.

Q. The work train came along that evening?

A. Yes, sir.

Q. After this thing occurred; after this talk between you and Bryant?

A. No, sir.

Q. Before that?

A. Yes, sir.

[fol. 90] Q. And you then reported it to Crance, the Supervisor?

A. I made mention of it to him.

Q. Did I understand you to say that Bryant left on that work train?

A. Oh, no.

Q. Bryant went on back to the toolhouse?

A. Oh, no, I didn't say that.

Q. Did Bryant go on back to the tool house?

A. I couldn't say because I turned one of the keys over to one of the boys running the car, told him I wasn't going to the toolhouse, and I come off and walked on down to the house instead of going to the toolhouse as I had been usually doing.

By Mr. Curry:

Q. To your house you mean?

A. Yes, sir.

By Mr. Perry:

Q. Now tell me what occurred on Monday morning when you started off with your tool car?

A. He was getting his stuff out and I said, "Marshall, I have refused to work you any more."

Q. Had Bryant brought his tools or anything to the tool car at that time?

A. He went in the tool house and got a pick and brought it out. I said "I refuse to work you."

Q. Then tell what occurred.

A. He says "I don't pay no attention to you. Mr. Long will have to tell me."

Q. Who was Mr. Long? The regular section foreman?

A. Yes, sir.

Q. Go ahead and tell what happened.

A. He just made the remark, he said "I will give you what I promised you," and started on right around the car to me. When I drew my gun he said "what are you going to do with that damn thing? I will make you eat it."

Q. When he said "Mr. Long hired me and will have to

fire me," or words to that effect where was he standing? Where was Bryant standing?

A. He was coming around the car to me.

[fol. 91] Q. And you were on the track by the side of the car?

A. I was on the west bound side.

Q. The car was between you two?

A. It was at the time he first came out and he came right on around the east end of it.

By Mr. Curry: I object to each one of these questions.

Overruled.

Q. You say he had started to come towards you?

A. He was coming around the car to me.

Q. And said he would do to you what he had promised?

A. Yes, sir.

Q. What did you say?

A. I never said anything.

Q. What did you do?

A. I drew my gun.

Q. You came there that morning with a gun in your pocket?

A. Yes, sir.

Q. And you drew it. Did Bryant stop when you drew the gun?

A. No, sir.

Q. What did he do?

A. He just said "what are you going to do with that damn thing. I will make you eat it."

Q. What did you do then?

A. I put it to work.

Q. What size man was Bryant?

A. He was a man that weighed around 160 pounds.

Q. What height?

A. I don't just know. He was a man about my height.

Q. You are about 5 foot 8?

A. I couldn't say just what.

Q. Was Bryant a bigger man than you?

A. Yes, he was a heavier man.

Q. And what did you weigh around that time?

A. I weighed around 140 or 145.

Q. When you began to shoot was it to protect yourself or because you were mad with Bryant or what was it?

Objected to as leading and suggestive. Overruled. Exception.

[fol. 92] A. It was to protect myself.

Q. Did Bryant have anything in his hand at the time?

Objected to as leading. Overruled. Exception.

A. He looked to have a knife in his hand because his hand was right down at his side like that (indicating).

Q. How far away was he from you?

A. I was standing right at the lever of the car on the west bound side and he was coming around the end of the car.

By Mr. Curry. Same objection to each one of these questions.

Overruled.

Q. How long had you known Bryant before this occurred?

A. I just stated I had been working him pretty near a year, somewhere like a year.

Q. Who was his cousin that you had discharged?

A. A man by the name of Luther Snead.

Q. Bryant lived in that neighborhood, didn't he?

A. Yes, sir; somewhere close.

Q. You were no kin to him?

A. No, sir.

Q. You yourself were a married man?

A. Yes, sir.

Q. Lived with your wife and family?

A. No, sir.

Q. Where did they live?

A. Moss Run.

Q. That is five or six miles from Backbone?

A. No, sir; two miles.

Q. Was the section gang that you worked white men or negroes?

A. It was about three or four colored men in the gang.

Q. At the time you told Bryant on Saturday you wouldn't work him any more, was anybody else near you?

A. No, sir. We was walking down the track alone. The rest of the crew was back up the track.

[fol. 93] Redirect examination.

By Mr. Curry:

Q. Was there any notice required before discharging a hand?

A. No, sir.

By Mr. Perry: Objected to on the ground that the defendant is not bound by this reply at this time.

By Mr. Curry: I asked the question because Mr. Perry started to ask the witness whether or not five days' notice was required before discharging a hand and then withdrew it.

By Mr. Perry: To which counsel replies that the question was asked and immediately withdrawn for the reason that that counsel for the defendant thought it would be incompetent.

Overruled. Exception.

Q. Do I understand that the foreman had a right to discharge a man immediately if he wasn't satisfactory?

By Mr. Perry: Same objection.

Overruled. Exception.

A. Yes, sir.

Q. Now I understood you in chief to say that you told Bryant that he was discharged, that he couldn't work any longer for the C. & O. as a track hand on Saturday before the shooting?

A. Yes, sir.

Q. Now on Monday morning you say that he appeared for work? Did you tell him then you had discharged him on Saturday and told him he musn't come back?

By Mr. Perry: Objected to on the ground the witness has already stated what his language was.

[fol. 94] A. Yes, sir.

Q. As I understood your examination, you had no personal feeling against Bryant?

A. No, sir.

By Mr. Perry: Objected to on the ground this is a conclusion of a witness who has already stated what occurred.

Q. Did you recognize or not that you had the right to put him off the premises or require him to leave the premises after you discharged him?

By Mr. Perry: Objected to on the ground that this witness cannot say whether he had the right or be the judge of what the scope of his employment was, for that is a matter as to which he cannot bind the defendant, and further, it is a conclusion of law.

Objection. Sustained. Exception.

(The following answer was given outside of the hearing of the jury and for the purpose of record only: "Yes, sir.")

Q. Mr. Perry asked you whether or not you were living with your wife and you said you were not. Had you separated from your wife?

A. Yes, sir.

Q. How long had you been separated?

A. We had been separated pretty near two years.

Q. How far did she live from you at that time?

A. About two miles or two and a half.

Q. Did you have any children?

A. Had two.

Q. They were small children?

A. Yes, sir.

Q. I understand you had no ill feeling or hatred against this man Bryant?

A. No, sir, I did not.

[fol. 95] Recross-examination.

By Mr. Perry:

Q. If you didn't have any ill feeling against him why did you shoot him?

A. Well, except he made those threats I was just protecting myself.

And further this deponent sayeth not.

JOHN L. PIERCE recalled.

By Mr. Stephenson:

Q. Were you out with the crew on Saturday night and Sunday cleaning up the wreck? previous to the shooting?
A. Yes, sir.
Q. Who was in charge of the section force at that time that worked at Backbone?
A. I don't think Dodson was there on Saturday night but on Sunday morning he was, he had it in charge on Sunday.
Q. On Sunday he was in charge clearing up the wreck and you were present?
A. Yes, sir.
Q. Was Mr. Bryant along?
A. No, sir, he wasn't there.
Q. On either Saturday night or Sunday?
A. No, sir.

Witness stands aside.

E. C. THOMPSON sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is E. C. Thompson?
A. Yes, sir.
Q. You are the father of Taylor Thompson who has heretofore testified in this case?
A. Yes, sir.
[fol. 96] Q. Where do you live?
A. Backbone.
Q. Were you living there in 1925 when Marshall Bryant was shot?
A. Yes, sir.
Q. And you are still living there?
A. Yes, sir.
Q. Are you employed by the Chesapeake & Ohio Railway Company now?
A. Yes, sir.

Q. Were you then?

A. Yes, sir.

Q. Mr. Thompson, you are not connected or related to any of the parties here, are you, to Marshall Bryant or Mr. Dodson?

A. No, sir.

Q. You knew them both, did you?

A. Yes, sir.

Q. How long had you been employed by the Chesapeake & Ohio Railway Company at that time, on that section crew, I mean?

A. Going on two years, I guess.

Q. During that time had you known Mr. Dodson?

A. Yes, sir, he was there when I went there.

Q. Had you also known Marshall Bryant during the preceding year?

A. Yes, sir.

Q. And up to the time of the shooting?

A. Yes, sir.

Q. He had been there about a year, hadn't he?

A. Yes, sir, about a year.

Q. You were not present at the shooting though?

A. No, sir.

Q. What size man was Marshall Bryant and what was his weight?

A. I guess he would weigh about 145 or 150 pounds, I have an idea that he would.

Q. And about what size and weight man was Mr. Dodson?

A. I don't think there was much difference in the weight of them.

Q. Did you work there with Mr. Bryant?

A. Yes, sir.

Q. Was he, or not, a good hand, or a good worker?

A. Yes, sir, Bryant was a good hand.

Q. Who was the regular foreman there on that section?

A. Mr. Long.

[fol. 97] Q. Mr. C. E. Long?

A. Yes, sir.

Q. What position, if any, did Mr. Dodson hold previous to this time when Mr. Long was away?

A. I just don't know how long he was off, I never gave it a thought.

Q. Here is the question I am asking you. Did Mr. Dodson before the time that Mr. Long went away to visit his sick mother, or whenever that was, before that time, had Mr. Dodson been working a crew or the section men?

A. Yes, sir.

Q. Was that separate and apart from where Mr. Long worked?

A. Yes, sir.

Q. Do you know what they were doing?

A. They first commenced putting in some ties and then they went to cutting the right of way.

Q. And that crew was in charge of Mr. Dodson, you say?

A. Yes, sir.

Q. About when was it that Mr. Long was called away, about how long before when he was called away for a few days there at a time on account of his mother's illness, how long before Marshall Bryant was shot, was that?

A. I think, as well as I remember, it was three or four days probably but I just don't remember positively.

Q. Who was in charge of the section in his absence, of the whole crew of men there?

A. Mr. Dodson.

Q. Mr. Con Dodson?

A. Yes, sir.

Q. Did he go out with you and oversee the work and was he present at the work and did he direct it?

A. Yes, sir—now, I wasn't with the crew, I was flagging, I didn't work with the crew at all.

By Mr. Perry:

Q. You were flagging for that crew?

A. Yes, sir, they were laying steel and I was flagging.

By Mr. Stephenson:

Q. Did you see Mr. L. D. Crance, the Supervisor of Maintenance of Way man on this Division, from Clifton Forge west, did you see him there during the time Mr. Long was gone, one day?

[fol. 98] A. I seen him there on Saturday.

Q. Was he present where the section hands were working or where the crew was working?

A. Yes, sir, he was there with them.

Q. And Mr. Dodson was in charge?

A. Yes, sir.

Q. Now Mr. Thompson, I wish you would state whether Mr. Long, the regular foreman, hired the men and discharged them whenever he felt like it, when he was foreman, did he?

A. Yes, sir, I suppose so, he was the one that hired me.

Q. Do you know of him hiring and firing other men while you were there?

A. Yes, sir.

Q. And that is a fact and that was commonly done and that was commonly known as the practice of the railroad company, was it?

A. Yes, sir.

Q. While Mr. Long was gone the section crew continued under Mr. Dodson to do the regular work there on the section, did they?

A. Yes, sir.

Q. Were you out with the crew on Saturday night and Sunday?

A. Yes, sir.

Q. What was the work that they were called out to do at that time?

A. There was a wreck up here at B. S. Cabin.

Q. Was that wreck on the main line track?

A. Yes, sir.

Q. Right up here at B. S. Cabin, west of Covington, was it?

A. Yes, sir.

Q. Did that section crew remove that wreck?

A. They helped to do it, yes, sir, we were all there.

Q. Who was there in charge of them and directing them on that work?

A. Dodson.

Q. Was Marshall Bryant out on Saturday night or Sunday working on that wreck?

A. No, sir.

Q. Now Mr. Thompson, what kind of a man was Mr. Con Dodson with reference to his temper and disposition; tell the jury about that?

A. He was a pretty fiery man, that is what I call him, he was high tempered and he would fly up and get mad.

[fol. 99] Q. Did it take much or little to provoke him?

A. It didn't take much, no.

Q. He would fly up on slight provocation?

A. Yes, sir.

Q. Did that happen often?

A. Right often.

Q. Right often?

A. Yes, sir.

Q. Did he get along with the men that he worked with and did they work with him well, or not?

A. No, sir, I don't think he did.

Q. Besides being fiery and not being able to get along with the men, did he have other peculiarities?

A. He was a right peculiar man, I always thought.

Q. Just tell the Court and jury about that.

A. Well, he would get mad and wouldn't speak to you hardly ever at times and then again he would be just as friendly as he could be.

Q. Now you knew the people that he worked with and lived with commonly, didn't you?

A. Yes, sir.

Q. You knew them at that time?

A. Yes, sir.

Q. And did you know of his general reputation touching the characteristics that you have described amongst them, just what they thought of him, I say, do you know what they thought about that from general and common thought.

A. They said he was a mighty peculiar fellow.

By Mr. Perry:

Q. Do you mean they said that before the shooting or after the shooting?

A. They said it both times, before and after too.

Q. You heard it after the shooting?

A. Yes, sir.

Q. Did you hear it discussed before the shooting?

A. Yes, sir.

Q. How long before the shooting?
A. Ever since I have been up there.

[fol. 100] By Mr. Stephenson:

Q. Then you know his general reputation touching the characteristics you have described, just what people thought of him in that vicinity and the men that worked with him?
A. Yes, sir.
Q. Was that the general reputation that he had, that he was a fiery man and couldn't get along with people?
A. Yes, sir.
Q. He had a peculiar temperament?
A. Yes, sir.
Q. Was that commonly and generally known by everyone?
A. It was up there.
Q. And you had known it all the time he had been up there?
A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. Did you ever have any trouble with him?
A. No, I never had no trouble, to say any trouble, he got mad at me as well as he did the others.
Q. What did he get mad with you about?
A. You wouldn't know what he would get mad about.
Q. When did it happen?
A. It happened several times up there.
Q. Because you did something that he thought was wrong?
A. I suppose so, but I didn't know.
Q. What did he do when he got mad with you?
A. He just wouldn't speak to me.
Q. Was he a profane man or a cursing man?
A. No, sir.
Q. He would just stop speaking?
A. Yes, sir, as long as he was that way I wouldn't pay no attention to him, I wouldn't bother him, and then again he was all right.

Q. You say you were flagging on Thursday when Mr. Long left and Dodson took charge?

A. That was on Saturday.

Q. It was on Saturday?

A. Yes, sir.

Q. Do you know when Mr. Long did leave?

A. No, sir, I don't know what day it was.

[fol. 101] Q. You would go out with the gang in the morning?

A. I was flagging, yes, sir.

Q. You would start out from the toolhouse, wouldn't you?

A. Yes, sir.

Q. Yet you were not interested enough in who was boss up there or whether Dodson was boss on Thursday, Friday or Saturday, were you?

A. He was left as Foreman. Mr. Crance told Mr. Long to put him in.

Q. Don't say what somebody else said, or what somebody else told you, unless you heard it. Is this something you heard Mr. Crance say?

A. He taken the crew out.

A. Yes, sir.

Q. What day did he take them out first?

A. I just don't remember.

Q. It is in evidence here that he took them out first on Thursday before the shooting. You went out with them then, didn't you?

A. Yes, sir.

Q. And you went out with them on Friday?

A. I was out with them on Friday, yes sir.

Q. You were out with them every day?

A. Yes, sir, every day.

Q. Now did you see Dodson get mad on any of those three days?

A. I wasn't working with the crew.

Q. But you went out with them?

A. I didn't hear anything when we went out. When we went out they would send me with the flag.

Q. Still you would go out with the gang to the place where you were to flag and then you would do the flagging?

A. Yes, sir.

Q. And you would be right with Dodson until that time?

A. Yes, sir.

Q. Before that time were you with his gang that was cutting the grass off the right of way?

A. No, sir.

Q. When was it that he was cutting the grass off the right of way?

A. I don't remember what time they commenced cutting the right of way.

[fol. 102] Q. Do you remember what time they finished?

A. No, sir.

Q. Did you see him at work there?

A. Yes, sir, I would see them out there.

Q. You were working at different places?

A. I was working with Mr. Long.

Q. Dodson was being ordered around by Mr. Long wasn't he?

A. I suppose so, yes, sir.

Q. And you don't know anything about Dodson getting mad with the men?

A. They said——

Q. Not what they said, but what you saw and heard yourself?

A. No.

Q. You do not know that he turned off Luther Snead?

A. No, sir, I don't know anything only what they told me.

Q. You know that Luther Snead was a cousin of Marshall Bryant, don't you?

A. They said so, yes, sir.

Q. Do you know anything about the relations between Con Dodson and Marshall Bryant that week, whether they were friendly or unfriendly?

A. As far as I know they were friendly.

Q. And you hadn't heard anything between them on Saturday evening?

A. No, sir.

Q. Did you go back to the toolhouse with the men on Saturday evening?

A. No, sir, we started down town, down here to Covington, and got up to Moss Run and this wreck happened, and we came on down there.

Q. And Mr. Young, the Assistant Supervisor, was there in charge of you all that night, at the wreck, wasn't he?

A. Yes, sir.

Q. Mr. Dodson was not there that night?

A. No, sir, but he was there on Sunday.

Q. Was Mr. Young there on Sunday or Mr. Crance there on Sunday?

A. I guess they were both there, but I don't remember.

Q. On Sunday?

A. Yes, sir.

Witness stands aside.

[fol. 103] W. M. McDowell (col'd) sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. You go by the name of Jim?

A. No, sir, they just calls me that.

Q. Were you working on the section when Mr. Marshall Bryant was shot by Mr. Dodson?

A. Yes, sir.

Q. Were you present at the shooting?

A. Yes, sir.

Q. And had you been working there some time before that?

A. Yes, sir.

Q. You are working for the C. & O. Railway Co. now?

A. No, sir, not right now.

Q. Have you been recently?

A. No, sir, not since last fall.

Q. Just go ahead and tell the Court and jury what you heard of the controversy there between Mr. Dodson and Mr. Bryant, just what occurred?

A. When I got there, Mr. Dodson, he was there, and they were all there and were mighty near ready to go out, and Bryant he came down just in a few minutes, or as I was getting there he came on down to the car and Mr. Dodson said to him, he says "I aint going to work you any more," and I don't suppose that Mr. Bryant heard him, and he

went on to the toolhouse to get his tools out, his shovel and pick out of the toolhouse and came on back and laid them on the lever car, and then he picked up his dinner bucket and put it on the lever car and Mr. Dodson said to him "I told you that I wasn't going to work you any more," and Mr. Bryant said "why, what is that for?" and he said "I just told you I aint going to work you any more, just get on up the road," and he said "I will see Mr. Long," and he said "I done told you to get on up the road," and Mr. Bryant he just stood there a few minutes at the lower end of the lever car and then Dodson he said to him, "well, I done told you to just get on up the road, I aint going to work you," and then he reached and pulled his gun out.

Q. Dodson did?

A. Yes, sir, he pulled his gun out and I never knowed anything more, whether there was anything more said until when the shooting occurred.

[fol. 104] Q. He proceeded to shoot him then, did he?

A. Yes, sir.

Q. Did that happen in a short time?

A. Yes, sir, it wasn't very long.

Q. It wasn't very long happening after this talk started?

A. No, sir.

Q. Now where was Mr. Bryant standing with reference to the lever car?

A. He was standing at the east end of the lever car.

Q. Facing which way?

A. Down the track.

Q. Facing west, was he?

A. Yes, sir.

Q. And Mr. Dodson was where?

A. He was over kinda to the left hand side.

Q. The left hand side coming this way?

A. Yes, sir.

Q. Like this table was the lever car, Mr. Dodson would be here somewhere and Mr. Bryant would be at that end (indicating)?

A. Yes, sir.

Q. About how far apart do you think they were?

A. I don't know exactly, I couldn't say.

Q. Some several feet?

A. Yes, sir.

Q. Now while that was transpiring, or while that was going on, did Mr. Bryant there make any attempt to strike Mr. Dodson or reach for anything, or anything of that kind?

A. Not a bit as I seen.

Q. Did he have anything in his hand?

A. No, sir, nothing but his gloves on.

Q. He had put his gloves on like he was going to work?

A. Yes, sir.

Q. Where were his hands?

A. Swinging down at his side.

Q. And all you men were standing around there close around, you and the other witnesses who have testified here?

A. Yes, sir.

Q How long had you been working there with Mr. Dodson?

A. I worked in the gang——

Q. I mean on the section?

A. About two years.

[fol. 105] Q. About two years before that?

A. Yes, sir, about that anyhow.

Q. And Mr. Dodson and Mr. Bryant both had been working there during that time or practically all of that time, hadn't they?

A. Yes, sir.

Q. Mr. Dodson all the time?

A. Yes, sir.

Q. I wish you would tell the Court and jury what kind of a man Mr. Dodson was in regard to his temper and disposition?

A. Well, as far as I knowed of him he was a kind of impassioned, very quick, it didn't seem to take very much to throw him out of passion, he was nervous or something of the kind.

Q. Was that what was generally thought of him by the people in the community and by the men with whom he worked?

A. They all seemed to think that is what he was, as far as I know.

Q. That is the general reputation he had in the community in which he lived?

A. Yes, sir.

Q. And it was well known to everybody?

A. Yes, sir.

Q. Was he in charge of that section crew in the absence of Mr. Long on this occasion and for three or four days preceding the time he shot Mr. Bryant?

A. I wasn't out at the time, only that morning.

Q. You had not been working immediately preceding the shooting?

A. No, sir.

Cross-examination.

By Mr. Perry:

Q. How long before the shooting had you been working for the Company?

A. You mean with Mr. Dodson?

Q. No, for the company.

A. I disremember now exactly how long.

Q. A right good long time, wasn't it?

A. You mean with Mr. Bryant?

Q. No, I mean for the company?

A. I had been working with them about a year or pretty close on to it.

[fol. 106] Q. And you had been on that section all of that time?

A. Yes, sir.

Q. Had you ever worked with Mr. Dodson?

A. No, sir, but I worked with him one day I believe.

Q. Did you ever work in the same gang with him?

A. No, sir.

Q. The day you worked with him did you have any trouble with him at all?

A. No, sir.

Objection. Overruled.

A. Yes, sir.

Q. He was a good worker, wasn't he?

A. Yes, sir, he did all right in work.

Q. Was he a profane man or a cusser when he would get mad?

A. No, sir, I never did hear him swear at all.

Q. Did you ever see him when he got mad?

A. Yes, sir, I seen him several times when he would get kinda fretted.

Q. Tell the jury what he did and who he got mad with?

A. So many different ones of them, I couldn't tell exactly, who all he got fretted with.

Q. You say he would get fretted so often. Now tell me one case?

A. The only one I really remember of his getting fretted with was Jake Armentrout.

Q. That is the day he shot this man?

A. No, sir, it was one man that is in here now.

Q. Who did he get fretted with at that time?

A. Jake Armentrout.

Q. He got fretted with him?

A. Yes, sir.

Q. Was that in your presence?

A. Yes, sir.

Q. Did he curse Armentrout or strike him?

A. No, sir, he didn't curse him at all.

Q. Did he strike him?

A. We were taking the push car off the track one morning, so we got over on the edge of the fill and Jake let his end down, and it was time to set it down anyhow and Mr. Dodson he shoved it against him, and Jake asked him what did he mean by that, and he told him "I will shove you over the fill."

[fol. 107] Q. Was that the end of it?

A. Jake told him "no he wouldn't."

Q. That is all that was said?

A. Yes, sir.

Q. How long was that before the shooting?

A. About two or three months I guess.

Q. Did Armentrout keep on working then?

A. Yes, sir.

Q. Worked for Dodson?

A. Yes, sir. I disremember now, I don't say he was working for Mr. Dodson at the same time, because I think Mr. Long was there, but he wasn't right with us, not right at the time.

Q. That happened because they were pushing against each other?

A. No, sir, they weren't pushing against each other at all, Jake got to the fill and he just set his end down and Mr. Dodson pulled his end over against his, right against

the side of his leg and Jake asked him what he meant to do and he said "I will push you over the fill," and Jake told him "no, he wouldn't."

Q. On the morning of the killing do you remember at all where you were standing?

A. I was standing at the upper end of the lever car, kinda on the side of it.

Q. You were standing on the opposite end of the lever car?

A. Kinda between the tracks, the east track and the west track.

Q. You were standing on the opposite end from Mr. Bryant?

A. Yes, sir.

Q. Did you stay there after the shooting began or did you leave?

A. Yes, sir, I stayed right there.

Q. Were you in line of the fire at all?

A. About the last shot, the way he throwed his gun around it came pretty close to me.

Q. That was about the last shot?

A. Yes, sir.

Q. And you were on the other side of the car from Bryant?

A. He was over on this side and I was over on this side (indicating), but he was shooting kinda down that way (indicating) and I was over like this (indicating).

Q. Do you remember hearing Bryant say "Now I will give you what is coming to you?"

A. No, sir.

[fol. 108] Q. Do you remember hearing Bryant say "I will make you eat that gun up?"

A. No, sir.

Witness stands aside.

C. B. Alfred sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Alfred, have you worked for the Chesapeake & Ohio Railway Co.?

A. Yes, sir.

Q. And had you worked for them previous to the time that Mr. Bryant was shot and killed on the Backbone section?

A. I was working at Low Moor at that time.

Q. I mean sometime previous you had worked there, hadn't you?

A. Yes, sir.

Q. Did you know Mr. Con Dodson?

A. Yes, sir.

Q. Had you worked with him and for him?

A. No, sir, I never worked with him but I worked close to him though.

Q. You mean on the same shift?

A. No, sir, I was on one shift and he was on the other.

Q. You mean the same crew?

A. He was on the night shift and I was on the day shift.

Q. On the section crew?

A. Yes, sir.

Q. How long had you worked up there on that Backbone section?

A. I don't know, I worked there a good while though.

Q. While Mr. Dodson was there?

A. Yes, sir.

Q. I wish you would tell the Court and jury what kind of a man Mr. Dodson was with reference to his temper and disposition?

By Mr. Perry: I would like to ask him a question in regard to the competency of this evidence.

[fol. 109] By the Court: Go ahead.

By Mr. Perry:

Q. You say you did not work with Mr. Dodson?

A. No, sir.

Q. You worked at night and Dodson worked in the daytime?

A. No, sir, I worked in the daytime.

Q. And Dodson worked at night?

A. Yes, sir, and I had to relieve him every morning.

Q. Did you ever work alongside of Dodson?

A. Yes, sir.

Q. When was that?

A. That has been several years ago, when I first came to this country, when they had wrecks up there and we would have to go to them, I was working at Callahan.

Q. When did you come to this country?

A. Sir?

Q. You say when you first come to this country; when did you first come to this country?

A. In 1912.

Q. That was 14 years ago?

A. Yes, sir.

Q. What was Dodson doing for the railroad company then?

A. He was working for Mr. Long, I think.

Q. 14 years ago?

A. Yes, sir, he was working for Mr. Long.

Q. He was working for Mr. Long on that section 14 years ago?

A. In 1912.

Q. Did you work with Dodson or alongside him?

A. I didn't work with him but I worked by the side of him.

Q. How long?

A. Until we would get the wreck up.

Q. You were working on the wrecking crew?

A. No, sir, I was working at Callahan and they would have a wreck and they would gather up all the crew and take them to the wreck.

Q. You were on another section?

A. Yes, sir.

Q. And the only time that you would work with Dodson was whenever there would be a wreck. Is that right?

A. That is the only time, until I went to work with Mr. Long.

[fol. 110] Q. And when you worked with Mr. Long you worked on the day force and Dodson was on the night force?

A. Yes, sir, he went to work at 11 o'clock and I went to work at seven o'clock the next morning and relieved him.

By Mr. Perry: If your Honor please, I object to this man's evidence.

By the Court: I don't know how much time a man would have to stay on a job to find that out. I think he can testify what Mr. Dodson's temper and disposition was if he saw it.

By Mr. Perry: It probably goes to the weight of his evidence.

By Mr. Stephenson:

Q. You say you did work with him way back there when you first knew him several years ago?

A. Yes, sir.

Q. Now I want you to tell the Court and jury what kind of a man, what kind of temper and disposition Mr. Dodson had?

A. He had a very mean one, he was a man that couldn't get along with nobody, it looked like you couldn't speak right, nobody he had working with him, and he had a way that nobody liked, he didn't know how to speak to you when he talked to you.

Q. Now were those characteristics that you have described, were they commonly known by the people in the community?

A. Yes, sir.

Q. By the people that worked with him and knew him?

A. Yes, sir.

Q. And was that, or not, his general reputation about those matters?

A. Yes, sir, that is his reputation with everybody.

Q. And everybody knew that?

A. Yes, sir.

Q. Will you please state what authority the Chesapeake & Ohio Railway Company foreman exercised with reference to the question of hiring and discharging men?

A. Every gang that I ever worked in, they had privilege of hiring and firing his own men.

[fol. 111] Q. And you have worked for the railroad during the last many years?

A. Yes, sir.

Q. At many different places, up and down the railroad?

A. Yes, sir, all over Greenbriar.

Q. And that is the common practice?

A. Yes, sir, for a man to hire and fire his own men, all that I ever worked for.

Cross-examination:

By Mr. Perry:

Q. Mr. Alfred, did you have any trouble with Dodson?
A. No, sir.
Q. You say he didn't know how to speak or talk to you. Did he speak to you all right?
A. No, sir.
Q. When did he speak wrong to you?
A. Up there one day I went after a plank, a crossing board to wheel across and he got mad because I took it.
Q. You started to do what, I didn't understand you?
A. Sir?
Q. What did you say you did?
A. I went after a crossing board to wheel dirt across the track and Mr. Wright had put a board there, he had nothing to do with it, but he was sitting on it, and I went and got the board and Mr. Wright told me where it was at and I went and got the board and he got miffed at me.
Q. What did he say to you?
A. He didn't say but very little to me. I told him I got the board and he sent the men word not to take it and I went and took it, and I told him it was the only board that I had to get as I had no other place to get one and I went there and took it and he said I had no right to take it and he went to Mr. Long about it, but I didn't care anything about it.
Q. He complained to Mr. Long?
A. Yes, sir.
Q. He didn't cuss you or say anything to you, did he?
A. No, sir.
Q. Did you ever have any other trouble with him?
A. No, sir.

[fol. 112] Witness stands aside.

Frank Alfred sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Alfred, where do you live?
A. In the east end of Covington.

Q. You are a son of Mr. Alfred who has just testified?

A. Yes, sir.

Q. Have you worked on the Chesapeake & Ohio Railway as a section hand during the past year?

A. Yes, sir, I worked on the railroad generally since I was 16 years old.

Q. I mean previous to 1925 when Marshall Bryant was killed, had you worked along here at Backbone and other places?

A. I worked for Mr. Jim Kelly.

Q. Have you also worked for Con Dodson or on the same shift he was on?

A. I worked with him with Mr. Long.

Q. How long were you working with him?

A. I worked up there two summers with him.

Q. You knew him very well then, did you?

A. Yes, sir.

Q. What kind of a man was Mr. Con Dodson with reference to disposition and temper?

A. He had a right bad temper I thought, he was right mulish like, and it didn't seem like he got along with anybody much, you couldn't *place* him no way.

Q. You say he couldn't get along with other people well?

A. No, sir.

Q. He didn't have the faculty of getting along with people or handling men?

A. No, sir.

Q. Is that the general reputation he had amongst the men?

A. Yes, sir.

Q. And in the community that knew him?

A. Yes, sir.

Q. There is no question about that?

A. No, sir.

[fol. 113] Q. Now these peculiarities of temper that you have described, what kind of things would they develop over small matters?

A. Yes, sir, small matters, it looked like he would get mad at little or nothing.

Q. Were they frequent?

A. Yes, sir.

Q. And well known to all the men?
A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. Did you ever have any trouble with him of any sort?
A. No, sir.
Q. And you worked with him for two summers?
A. Yes, sir.
Q. Were you in this gang that was cleaning up the right of way and cutting the grass and weeds?
A. No, sir.
Q. Where did you work?
A. I worked in the gang with him for Mr. Long when he was working as a hand just the same as I was.
Q. That was last summer that you worked there with Dodson?
A. He killed Bryant in 1925.
Q. That was the last summer you worked, or when was the last summer you worked?
A. I think 1923 was the last work I done.
Q. And he was working there as a hand then?
A. Yes, sir.
Q. And did you work in 1922 or 1921?
A. No, sir, I think it was—dogged if I know, it might have been 1922, I don't know whether it was or not.
Q. In reference to this bad temper, can you remember any occasions that he showed bad temper and can you tell the jury about that?
A. He would get mad with the men up there and wouldn't speak to nobody.
Q. He just wouldn't speak to them?
A. He just would get mad at anything.
Q. He wasn't a cusser or a profane man?
A. No, sir, he didn't cuss.
[fol. 114] Q. He was not a fighting man?
A. I never knowed him to be in no fight.
Q. He would get insulted and wouldn't speak to them?
A. Yes, sir.

Witness stands aside.

JAKE A. ARMENTROUT sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Where do you live?
A. Callahan.
Q. Your home is there, is it?
A. Yes, sir.
Q. Are you acquainted with Con Dodson?
A. Yes, sir.
Q. Did you ever work with him?
A. Yes, sir, I have worked with him.
Q. About when did you work with him?
A. I just don't remember when it was that I worked with him but it has been about two or three years ago, I guess.
Q. Had you known him for sometime previous to that?
A. Yes, sir.
Q. You live at Backbone or Moss Run, don't you?
A. Between Moss Run and Callahan.
Q. That section runs along there, doesn't it?
A. No, not along there it doesn't.
Q. I mean the Backbone section?
A. West of Moss Run.
Q. And you live near Moss Run?
A. Yes, sir.
Q. Where did Dodson live?
A. At Backbone.
Q. That is only a short distance from Moss Run, isn't it, a couple of miles?
A. Yes, sir, about a couple of miles.
Q. And had you known him then most of the time that he had been up there working for the railroad company?
A. Yes, sir, I had.
[fol. 115] Q. You were raised there?
A. Yes, sir.
Q. Now I want you to tell the Court and jury what kind of a man Mr. Dodson was with reference to his disposition.

By Mr. Perry: Ask him what his opportunities were for knowing.

By Mr. Stephenson:

Q. Did you work with him and see him frequently while you were working there?

A. While I was working there.

Q. Yes, sir?

A. Yes, sir, I worked with him.

Q. And previously to that you had known him there at his work and had seen him at work?

A. Yes, sir.

Q. What was his disposition and temper and how did he get along with the other men, I want to ask you that question, tell the Court and jury about that?

A. I couldn't answer it further than I didn't get along with him so very well myself.

Q. I wasn't asking particularly how you got along with him, but how he got along with the men generally. Did he have friction, or not, with them?

A. Yes, sir, he did.

Q. Did he have that general reputation amongst the men he worked with and the men that knew him, that he was a man that couldn't get along with other men and had fits of temper?

A. I don't know.

Q. Sir?

A. Yes, sir, he was a fellow that couldn't hardly get along with anybody any way. If you done to suit him it would be all right.

Q. And if you didn't, it wasn't?

A. Yes, sir.

Q. And was that known in the community, I mean among the people that worked with him and knew of him, and is that what they commonly thought of him?

A. Yes, sir, I think so.

[fol. 116] By Mr. Perry: He only knew what his own experience was. He said he didn't know what the men said about him.

By Mr. Stephenson: He didn't say that.

By the Court: I am inclined to think that Mr. Armentrout has not stated that he knew what the men generally said about Dodson, and the foundation ought to be laid before he can testify to what his general reputation was.

By Mr. Stephenson:

Q. Mr. Armentrout, do you know what was generally thought of Mr. Dodson by the people with whom he worked and who knew him there with reference to the question of his general disposition and temper, do you know that, not from what you know, but from what people generally knew about it, do you know it, or not?

A. Well, no, I don't know it.

Q. All right, then I won't ask you about it?

No cross-examination.

Witness stands aside.

STIPULATION RE ADMINISTRATOR

It is admitted that the plaintiff duly qualified as administrator of Marshall Bryant, deceased.

Mrs. MARSHALL BRYANT sworn for plaintiff.

Direct examination.

By Mr. Curry:

Q. I believe you are the widow of Marshall Bryant, deceased?

A. Yes, sir.

Q. What is your age?

A. I will be 24 years old the first day of August coming.

Q. And when was your husband born?

A. He was born in 1902.

[fol. 117] Q. What time in 1902?

A. May 22nd, 1902.

Q. He was born May 22nd, 1902?

A. Yes, sir.

Q. And how many children have you by Mr. Bryant?

A. Two.

Q. How old are the children and when were they born?

A. The oldest one was born, well, he was four years old the 6th of January past.

Q. And he was then just a little over two years old when your husband was killed?

A. Yes, sir.

Q. And how old was the baby when he was killed?

A. He was four months old.

Q. Are they boys or girls?

A. Both boys.

Q. What are their names?

A. Mason Henry is the oldest one.

Q. What is the name of the other?

A. Arthur Lee.

Q. What is your name?

A. My name is Orie.

Q. Did your husband leave any estate?

A. No, sir.

By Mr. Perry: I ask that the last question and answer be stricken out.

By the Court: I think so. It is immaterial.

By Mr. Perry: I do not care to cross-examine Mrs. Bryant and I want to recall E. C. Thompson.

By Mr. Curry: I want to offer the Standard Mortality Table, but I can do that later on.

Witness stands aside.

E. C. Thompson recalled.

By Mr. Perry:

Q. Mr. Thompson, did you see Mr. Bryant that morning before he went to the toolhouse?

A. Yes, sir.

[fol. 118] By Mr. Perry: I want to ask a question, if your Honor please, and I am pretty sure it will be objected to and I would rather ask it when the jury is not here to see what your Honor will do about it.

By the Court: Let the jury retire.

(Jury retires from Court room.)

By Mr. Perry:

Q. State whether or not you had any conversation with Mr. Bryant on Monday morning that he was killed before

he went to the toolhouse, in regard to a quarrel or misunderstanding between Bryant and Dodson, if so, what that conversation was?

By Mr. Stephenson: We object to the question on the ground that it is impertinent to the issue and irrelevant.

By the Court: Of course a conversation upon any subject might be.

By Mr. Perry: I have stated what the subject was.

By the Court: Read the question. (Question read to Court.)

By the Court: I think it is admissible.

By Mr. Perry:

Q. Answer the question, you did have such a conversation?

A. Yes, sir, I was talking with Mr. Bryant the morning he came down, he stopped at my house on the railroad and we had a few words, I just don't remember what we were talking about but he said "well, I will go on down, I guess Dodson will fire me this morning."

Q. What else?

A. I asked him "why," and he said "that Dodson had been talking about him, and he told him if he didn't quit [fol. 119] talking about him that one or tother of us would have to take a whipping," and Dodson just made the reply "all right fellow, I have got the difference in my pocket."

(Jury returns into Court room.)

By the Court: Gentlemen of the jury, this question and answer was asked Mr. Thompson during your absence and the question will now be read and his answer will be read as if it had been asked in your presence and answered in your presence.

(Said question and answer was here read to the jury.)

Witness stands aside.

By Mr. Curry: We will rest, with the exception of putting the Standard Mortality Table in.

By the Court: Very well, we will adjourn until tomorrow morning.

(Court adjourns until tomorrow morning.)

Thursday, April 28th, 1927, Morning Session

STIPULATION RE EXPECTANCY OF LIFE

It is agreed by counsel for both sides that the expectancy of life of the deceased, Bryant, is 40 years, according to the Standard Mortality Table.

By Mr. Perry: Now I want to recall Taylor Thompson.

TAYLOR THOMPSON recalled.

By Mr. Perry:

Q. Mr. Thompson, you testified on yesterday?
A. Yes, sir.
Q. Did you see Bryant on the morning before he was killed, before he went to work?
[fol. 120] A. No, sir, I didn't see him I don't think.
Q. Did you have any talk with him at all between Saturday evening and Monday morning?
A. No, sir.
Q. In regard to his work or in regard to Dodson?
A. No, sir, I never saw him at all until Monday morning when he went to work.
Q. Did you see him before he went to work on Monday morning?
A. No, sir, I never saw him until he came to work on Monday morning.
Q. And you had no private talk with him at all?
A. No, sir.

By Mr. Stephenson:

Q. Was Marshall Bryant a healthy young man?
A. He looked to be pretty healthy.
Q. He was a man that worked regularly and was a healthy man, wasn't he?
A. Yes, sir, he looked to be a healthy man and he worked pretty regularly.
Q. He was a young, active, industrious man, was he?
A. Yes, sir.

Q. Did you know of your own knowledge what he got per day for his labor?
A. Yes, sir, he got 37¢ per hour or $2.96 per day.
Q. You know that of your own knowledge, do you?
A. Yes, sir.

By Mr. Perry:

Q. For an eight-hour day?
A. Yes, sir.

Witness stands aside.

Dolph M. Wright sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Wright, do you know Mr. J. E. Long, the section foreman?
[fol. 121] A. Yes, sir.
Q. You worked on the section, with him, did you not?
A. Yes, sir.
Q. Did you have a conversation with Mr. J. E. Long sometime around about the time of the shooting of Marshall Bryant, somewhere on the tracks there while you were working, with reference to the question of Mr. Dodson and whether or not he was a nervous man, if so, just state what the conversation was?

By Mr. Perry: Was that before the killing?
By Mr. Stephenson: The conversation may not have been.

Q. You understood the question, didn't you?
A. Yes, sir.
Q. Just state what Mr. Long said to you about that?

By Mr. Perry: I object to anything Mr. Long said. What this witness may have told Mr. Long is competent evidence, but the railroad company cannot be bound by admissions of its agents, but what the witness told Mr. Long is a different thing.
By Mr. Curry: Not what this witness told him, but what Mr. Long told him.

By Mr. Perry: We cannot be bound by any statement of an agent.

By the Court: Any declarations made by a servant or employee of the railroad company, either before or after, is not binding.

By Mr. Curry: That is ordinarily true, there is no doubt about that, but you know Mr. Long was his superior and Mr. Long was an agent of the C. & O. to employ people and did employ them and he employed Dodson. Now on one branch of our case we rely upon the theory that the railway company was negligent in employing Mr. Dodson and the theory that he was a nervous man and an incompetent person, and that is the theory upon which we asked the [fol. 122] question and that was to bring notice home of the kind of man that Mr. Dodson was. We charge in our declaration that the company was negligent in putting this man in charge of the hands and that they knew or ought to have known by the exercise of ordinary care that he was an incompetent and improper person to be put in charge of hands, and that is what we want to show, that that was brought home to Mr. Long, that was the purpose of it.

By the Court: The question here is whether or not Dodson was a suitable person and whether the railroad company had notice of what sort of man he was.

By Mr. Curry: Or might have had notice.

By the Court: Or might have had notice. The evidence in the case so far tends to show that Mr. Long delegated Dodson as foreman, but what his authority was in that respect, what Mr. Long's authority in that respect does not appear.

By Mr. Stephenson: He was authorized by Mr. Crance, who was the supervisor of Maintenance of Way.

By the Court: I think if the plaintiff can show that Mr. Long was advised of what sort of man Mr. Dodson was and that they can show that Mr. Long regarded him as an improper person he ought to be allowed to do it by statements made by Mr. Long.

Defendant excepts.

By Mr. Stephenson:

Q. Read the question.

(Question read to the witness.)

A. Mr. Stephenson had a misunderstanding of me, this was after the shooting.

By Mr. Perry: He says it was after the shooting and certainly no admissions after the shooting is proper.

By Mr. Curry: Any admission afterwards is just as good as before.

[fol. 123] By Mr. Perry: By an agent?

By Mr. Curry: That he knew. This man was arrested immediately.

By the Court: There is a good deal of doubt about that. Statements made by an employee of a railroad company after the occurrence which is being investigated.

By Mr. Curry: That is an admission that he knew. He was acting as the agent of the railroad company in employing the hands, and the evidence here shows or tends to show that he employed Dodson.

By the Court: I have a great deal of doubt about it, but if you want to take the risk you can do so. You are purposing showing a statement made by Mr. Long with reference to the characteristics of Mr. Dodson, which statement was made after the occurrence which is the subject of investigation here. Go ahead I will let you ask the question. The purpose of your question is to show Mr. Long knew that Mr. Dodson was not a proper foreman.

By Mr. Curry: That is the purpose of it.

By the Court: Go ahead, but I have some doubt about it.

Defendant excepts.

By Mr. Stephenson:

Q. Just state what Mr. Long said in that conversation?

A. He didn't altogether make it just to me, but he made it to several that Mr. Dodson was kinda nervous and that he shot through the window maybe once, that is all that I paid any attention to.

Q. What did he say about him shooting?

A. That he heard a noise and that he was kinda nervous and scary like and that he just shot through the window.

Q. He would shoot through the window?

[fol. 124] By Mr. Perry: He didn't say that he would shoot through the window but that he had shot through the window. That is what you said isn't it?

A. Yes, sir.

By Mr. Stephenson:

Q. Did Long and Dodson live in the same house there at Backbone together or near Backbone?

A. They stayed together over there where Dodson lived.

Q. They occupied the same house?

A. Yes, sir.

Q. Whose house was that?

A. That was Dodson's house.

Q. And Long, the foreman, lived there?

A. He stayed there.

Q. And he was narrating to you what had happened in that house, was he?

A. Yes, sir.

Q. That had happened before the shooting, wasn't it, the occurrence that he talked about?

A. The shooting of Bryant?

Q. Yes, sir.

A. No, sir, it was afterwards.

Q. I am not talking about the conversation, but I am talking about the shooting that had taken place before. This incident that he was telling you about, about his nervousness and about his shooting in the dark, it happened previous to the shooting of Marshall Bryant. Is that correct, or not?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. And I understand you to say that he said in that conversation that he would just shoot out in the dark at anything he heard.

By Mr. Perry: He didn't say that, he said he had shot, but he didn't say that he would shoot at anything.

By the Court: The jury heard what he said.

[fol. 125] By Mr. Perry:

Q. Where was this conversation?

A. This was down there on the track where we were working.

Q. After the shooting?

A. Yes, sir.

Q. How long after the shooting?

A. I don't know exactly just how long it was.

Q. Was it after Dodson had been tried?

A. Yes, sir.

Q. And just what was it that Mr. Long said?

A. That Mr. Dodson was kinda nervous, that he just shot out of the window and was scary like.

Q. Did he state why he shot out of the window?

A. No, sir, I never paid any attention much to it.

Q. Did he say anything about Dodson having thought that somebody was out there, or something of that sort?

A. Yes, sir, I believe he did say that.

Q. Just what was that?

A. He said when he heard anything.

Q. He did say that when he shot out of the window?

A. Yes, sir, at night.

Q. Or when did he say that he shot out of the window?

A. At night.

Witness stands aside.

TAYLOR THOMPSON recalled.

By Mr. Stephenson:

Q. You have heretofore testified in this matter?

A. Yes, sir.

Q. You know Mr. Long, of course, the foreman there, don't you?

A. Yes, sir.

Q. Did you hear him discussing the matter as to Mr. Con Dodson and what he did with a gun around the house on one or more occasions?

Same objection. Overruled. Exception.

A. Yes, sir, I heard him say that Mr. Dodson got up one night, he heard a racket around the house and he shot two

[fol. 126] or three times, maybe three, through the screen on the window and he said it was dangerous for a man to be around the house over there that Dodson would just shoot whenever he heard a racket and that he got up that night and shot through the screen.

By Mr. Perry:

Q. When did he say that?

A. That was right after he shot Bryant, that was the next day, I think.

Q. When did Long say this?

A. He told us out there on the track the next day after he done the shooting through the screen?

Q. The next day after he shot through the screen?

A. Yes, sir, he told about it a day after Bryant had been shot.

Q. When was it that he shot through the screen?

A. I don't remember the date, but it was one night is all I remember that he shot through the screen and I saw the holes through the screen.

Q. How long was that before he shot Bryant?

A. I expect a week or so, I don't remember just how long.

Q. A week or so before he shot Bryant?

A. Yes, sir.

Q. Was Dodson present at the time?

A. Dodson, he was working a bunch of men on the upper end of the section, he wasn't in our gang.

Q. How did Long come to tell you that?

A. I don't know, he just happened to think about it and told us about it.

Q. You had a conversation, didn't you, with Marshall Bryant on Saturday evening, about Marshall Bryant's relations with Dodson, didn't you?

A. No, sir, I didn't talk with Marshall Bryant only when I was working with him.

Q. You heard Marshall Bryant make a statement on Saturday evening about trouble with Dodson?

A. No, sir, I did not.

Q. You did not hear Marshall Bryant say anything about Dodson?

A. No, sir, not to me.

Q. Didn't you hear him say that Dodson had been talking about him?

[fol. 127] By Mr. Stephenson: We object to that. He is making this man his own witness on that point and he cannot cross-examine him.

By the Court: He has a right to do that, if he wants to make him his own witness.

By Mr. Stephenson: But he cannot cross-examine him and that is what he is doing. He cannot make him his own witness and cross-examine him at the same time.

By the Court: I don't know whether you can call that cross-examination, or not. He is asking him questions in a rather abrupt manner.

By Mr. Stephenson: The witness has denied the transaction and he is trying to force something out of him.

By the Court: I do not think you can contradict him.

By Mr. Perry: I am not going to contradict him.

Q. Didn't Bryant tell you that he and Dodson had had some words and that if Dodson didn't stop talking about him one or the other of them were going to take a whipping?

Objection. Overruled. Exception.

Q. Answer the question.

A. I don't remember that, if he asked me that, he might have asked me, but I don't remember it now.

Q. He might have told you that?

A. I don't remember it if he did.

Q. You did remember it at one time, didn't you?

A. If I did remember it once, I don't now.

Q. Didn't Bryant tell you words to that effect?

A. I don't remember that I talked to Bryant except just through the work that day.

Q. Didn't you hear Bryant say words to that effect?

A. I haven't got any recollection of it at all.

[fol. 128] By Mr. Stephenson: We move to strike that evidence out on that point.

By the Court: I think the motion ought to be sustained. Mr. Perry, counsel for the railroad company says he does not purpose attempting to contradict this witness and the questions and answers in reference to a supposed conversation that he had with Bryant on the day before the shooting may be stricken out.

By Mr. Stephenson:

Q. Now Mr. Thompson, I had not finished examining you when Mr. Perry interrupted me.

By Mr. Perry: I beg your pardon.

By Mr. Stephenson:

Q. The conversation which you had with Mr. Long about Dodson, Long saying that Dodson got up in the night and shot out through the screen, was on the day immediately after that occurred. Is that right?

A. Yes, sir.

Q. Immediately after the shooting occurred through the window?

By the Court: He has already answered that question and I am not going to permit any repetitions.

By Mr. Stephenson: The only reason I am asking it is because Mr. Perry took the witness away from me and I had not had an opportunity to ask him that.

By the Court: He had already been examined on that point.

By Mr. Stephenson: That is all I want to ask him.

Witness stands aside.

[fol. 129] SAMUEL J. WRIGHT recalled.

By Mr. Stephenson:

Q. Mr. Wright, were you present at the time when Mr. Long, the foreman was talking about a matter of Mr. Dodson doing some shooting at night around the house there where they lived?

Same objection. Overruled. Exception.

A. Yes, sir.

Q. Tell the Court and jury what that conversation was and when it was.

Same objection. Overruled. Exception.

A. He came out there and told us that it was really dangerous that the man was nervous and it wouldn't do for anyone to fool around where he was at.

Q. Did he tell you what he had done?
A. Yes, sir.
Q. What did he say he had done?
A. He said he had shot through the window that night.
Q. When was that that he was telling you about this?
A. He told us just before he done this shooting.
Q. You mean he told that before the shooting of Bryant?
A. Yes, sir.
Q. And that was with reference to the shooting that Dodson had done through the window or door, or whatever it was, or when was it with reference to that, was it shortly afterwards?
A. No, sir, that was before, he shot through this window before he done this shooting of this man you understand?
Q. Yes, I understand that, and when was it that he was telling it, was it shortly afterwards?
A. Yes, sir, it was shortly after he had done this other shooting you know.
Q. Did he tell you more than once about that, or did he discuss that more than once that you heard?
A. Yes, sir.
Q. When did he talk about it again?
[fol. 130] A. Several different times it would come up in a way, in talking.
Q. And this first time was immediately after it happened, you say?
A. Yes, sir.
Q. I mean immediately after the shooting through the window?
A. Yes, sir.
Q. Did he say what he shot with?
A. No, sir, he didn't say.
Q. Did he say what he was shooting at?
A. No, sir, he didn't say what he was shooting at.

Cross-examination.

By Mr. Perry:

Q. Just when was this, I mean the time when it occurred?
A. I don't know what time it occurred, but it occurred before he done this shooting.

Q. That is, before he shot Bryant?

A. Yes, sir, and then Mr. Long, he came out and told us after he done this shooting, and he said "he is a nervous man."

Q. He had done the shooting the night before and Long told this out on the section, and——

A. No, sir.

Q. Wait until I finish my question, and Long out on the section told you all about it?

A. Yes, sir, he told us on the section about it.

Q. How did he come to tell you that?

A. It just came up in a way of talking you know, in a conversation, we were all talking.

Q. Was Dodson there at the time?

A. No, sir.

Q. Now just what did Long say that Dodson had done?

A. He said that he was nervous and he had been shooting up there.

Q. Up where?

A. At his house.

Q. That is, at Dodson's house?

A. Yes, sir.

Q. Did Dodson and Long live together?

A. He was staying up there with Dodson just batching with him.

[fol. 131] Q. And he said that this shooting had been done the night before by Dodson up at the house. Now what did he say brought the shooting about?

A. He never said.

Q. What did he say he shot at?

A. He never said what he shot at, he just heard a racket.

Q. That Dodson heard a racket out doors?

A. Yes, sir.

Q. And he shot through the door?

A. No, sir, he shot through the window.

Q. At whatever he heard outside?

A. Yes, sir.

Q. Didn't he say something about the dogs making a racket?

A. No, sir, I never understood what he said about the dogs.

Q. What did he say about him being real dangerous?

A. About Dodson being real dangerous?

Q. Yes, sir.

A. He said he was nervous and real dangerous.

Q. That Dodson was nervous and real dangerous?

A. Yes, sir.

Q. Did you ever hear of Dodson ever hitting a man?

A. No, sir.

Q. Did you ever hear of Dodson having a fight?

A. No, sir.

Q. And how long did you work with Dodson on the section?

A. I worked with Dodson off and on about six months when Long was gone.

Q. When Long was there how long did you work with him?

A. I didn't work so awful long when he was there for he always kept him off somewhere else.

Q. Dodson was a very quiet and retiring sort of man, wasn't he?

A. No, sir, he was nervous.

Q. But he was a quiet man and he didn't talk much to other people, did he?

A. He talked a good deal.

Q. Was he a modest man or was he a cursing and bully?

A. He was pretty stubborn.

Q. You said on yesterday that he did not cuss, that he was not a profane man or a cusser, you said that on yesterday?

A. Yes, sir, he swore some.

Q. Did he swear at the men or just swear about his work?

A. He would curse the other men.

[fol. 132] Q. On yesterday you stated that he was not a profane man. Now how do you explain the difference when you say now he did cuss?

A. You say that I did state that on yesterday?

Q. That is my recollection.

A. I don't think I did.

Q. Some other witness may have said that. You never heard him having any difficulty with any of the men?

A. No, sir.

Q. Either off or on the work?

A. No, sir.

Witness stands aside.

E. C. THOMPSON recalled.

By Mr. Stephenson:

Q. Did you ever hear any conversation by Mr. E. C. Long, the section foreman, touching the question of Mr. Con Dodson shooting with a gun around the house or anything of that kind, previous to the time Bryant was killed?

By Mr. Perry: I make the same objection to this and all following questions on the same line.

Objection overruled. Defendant excepts.

A. I heard him say out on the track that Dodson shot through the window one night, that he heard a racket and he raised the window and shot through the window.

Q. Did he say anything further about that?

A. He said it was dangerous for a man to come around there.

Q. About how long after that occurrence, that shooting through the window was it until Long was telling about that; shortly afterwards, or how long?

A. It was the next day or two I think.

Q. Did he mention it at any other time that you recall?

A. No, sir, I don't remember him saying anything more about it.

Q. Now at that time, when that occurred, where was Dodson and Mr. Long Living?

A. They were living over there in the hollow at Dodson's place.

[fol. 133] Q. They were living over there in the hollow at Dodson's place at Backbone?

A. Yes, sir, Mr. Long was staying with him.

Q. At Mr. Dodson's house?

A. Yes, sir.

Q. They were both living there and batching in the house, weren't they?

A. Yes, sir.

Q. Their families were not there?

A. No, sir.

Q. They were both married men, weren't they?

A. Yes, sir.

Q. Did their families live at Backbone?

A. No, sir, Mr. Long's family lived at Moss Run.

Q. And so did Dodson?

A. Mr. Dodson's wife was down at her father's

Q. They were not living with their families, or were they?

Objected to as immaterial and irrelevant.

By the Court: I do not think it is material.

By Mr. Perry:

Q. This was some little time before the shooting of Bryant that you heard this?

A. Yes, sir, this was before the shooting of Bryant.

Q. Do you recall how long before Dodson shot Bryant it was?

A. No, sir, I just don't remember, it might have been a month or it might have been longer or not so long.

Q. It was the same summer?

A. Yes, sir.

Q. And Long, down on the track, either the next day or the day after, told you men that Dodson the night before had shot through the window or had raised the window and shot?

A. Yes, sir.

Q. Did he say why he had shot?

A. No, sir, but he said he heard a racket and he just shot through the window.

Q. Into the outside?

A. Yes, sir.

[fol. 134] Q. And then I understood you to say that Mr. Long said it was dangerous for a man to be around outside the house. Is that correct?

A. He said it was dangerous for a man coming around there.

Q. To come around the house?

A. Yes, sir.

Q. How long did you work with Dodson?

A. I don't suppose I worked over six or eight months with Dodson until he taken a gang to himself.

Q. Did Dodson ever have a fight or difficulty with any man while you were there?

A. No, sir, he never did.

Q. Did you ever hear of him striking anybody or seeing him strike anybody?

A. No, sir.

Q. What was his disposition, was he a peaceful man, or not?

A. No, sir, he wasn't.

Q. What was his disposition?

A. He had a disposition that it didn't seem like he could get along with anybody.

Q. But he was not a fighter?

A. No, sir, he never had any fight or anything like that.

Witness stands aside.

W. M. McDowell (col'd) recalled.

By Mr. Stephenson:

Q. You are acquainted with Mr. C. E. Long, the foreman, of course?

A. Yes, sir.

Q. Did you ever hear any conversation by Mr. Long touching the question of Mr. Con Dodson having been a man that would shoot and of his shooting around up there at the house where they lived previous to the time that Bryant was shot?

By Mr. Perry: I make the same objection as heretofore, and except to this and other questions and answers on the same line.

A. I heard Mr. Long speak out there one day out on the railroad a while back before the shooting occurred at the [fol. 135] toolhouse, that they heard a racket up at the house one night and Mr. Dodson got up and shot through the screen window and he stated then that it would be dangerous for anybody to fool around where Mr. Dodson was, that he was nervous and they would be liable to be shot.

Q. That it was dangerous for anyone to fool around where he was, that he was nervous and would shoot him?

A. Yes, sir.

Q. You are positive about that statement?

A. Yes, sir.

Q. Was that shortly after the shooting through the window had occurred?

A. I don't know exactly how long it was, it was three or four weeks I reckon.

Q. Before the shooting of Bryant, you mean?

A. Yes, sir.

Q. And was that shortly after the incident that he was telling about, was it shortly after the shooting through the window that he was telling you men about it?

A. He told it a few days after the shooting at the house.

Q. Was that about the purport of his conversation in regard to that?

A. Yes, sir.

Q. Was that about the extent of his conversation?

A. Yes, sir.

Q. Did he comment or say anything about it at any other time that you know of, or after Marshall Bryant was shot?

A. Not to my knowing, I never heard of it.

Cross-examination.

By Mr. Perry:

Q. That was out on the track, wasn't it, William; do they call you William or Jim?

A. William.

Q. That was out on the track?

A. Yes, sir.

Q. Do you know whether Dodson was there when Mr. Long was talking?

A. No, sir, he wasn't present at the time.

Q. State again just what it was that Mr. Long said had happened.

[fol. 136] A. He said that they heard a racket around the house at night.

Q. The night before or two or three nights before?

A. The night he done the shooting at the house I am speaking of, so Mr. Dodson, he got up and got his gun and shot through the window, he thought he heard someone walking or something or other and he shot through the window screen.

Q. And he said that it was dangerous for anybody to be around there?

A. Dangerous for anyone to fool around where he was, because he was nervous and liable to shoot him.

Q. Did he say that it was dangerous for anyone to fool up around the house?

A. Yes, sir, that is what he said.

Q. He meant at night, I suppose?

A. I guess so.

Q. You have seen Mr. Dodson working around there for a good many months, hadn't you?

A. Yes, sir, about two years. I figured it up last night, and I worked around there for about two years.

Q. Did you ever hear or see him have any fight with anybody?

A. No, sir.

Q. Did you ever hear of him having any fight?

A. No, sir.

Q. He did not engage in any personal difficulties at all, did he?

A. Not to my knowling.

By Mr. Stephenson:

Q. But he was a man that did not get along easy with people, wasn't he?

A. He was kinda of fractious.

Q. Kinda fractious?

A. Yes, sir.

Witness stands aside.

Plaintiff rests in chief.

EVIDENCE INTRODUCED ON BEHALF OF DEFENDANT

By Mr. Perry: If your Honor please, I want to introduce the indictment of Con. P. Dodson and the record of his conviction.

[fol. 137] By Mr. Stephenson: We object to it because it is immaterial here.

By Mr. Perry: It is rather material because this was a felony and the result of a private quarrel.

By Mr. Stephenson: Counsel for the defendant has stated in his statement to the jury that he was convicted and sent to the penitentiary.

By Mr. Perry: Cannot I prove what I stated?

By Mr. Stephenson: We object to this evidence and submit that it is entirely incompetent.

By the Court: What is the materiality of it, Mr. Perry?

By Mr. Perry: The materiality is this, there is a strong presumption that a felony or a felonious assault was not and could not have been committeed within the scope of the man's employment, therefore it is material to show that the assault was a felonious assault and the best proof is the man's conviction of a felony.

By the Court: I think it is immaterial.

By Mr. Perry: I desire, for the purposes of the record, to offer the indictment and record of his conviction and except to the ruling of the Court.

L. E. Crance, sworn for defendant.

Direct examination.

By Mr. Perry:

Q. Mr. Crance, where do you live?

A. I room at Clifton Forge, and I live at Ashland, Kentucky.

Q. You are in the employment of the Chesapeake & Chio Railway Company?

A. Yes, sir.

[fol. 138] Q. How long have you worked for the railroad company?

A. About 23 years.

Q. What is your position at the present time?

A. Supervisor of Tracks.

Q. In what district?

A. The Alleghany District.

Q. That is, from Clifton Forge, Virginia, to Hinton, W. Va.?

A. Yes, sir.

Q. You were Supervisor of Tracks at the time of the shooting of Bryant by Mr. Dodson, weren't you?

A. Yes, sir.

Q. Was the section at Backbone within your district?

A. Yes, sir.

Q. State whether or not you knew Dodson, the man who shot Bryant?

A. Yes, sir, I knew him.

Q. How long had you known him?

A. I couldn't say just exactly but about seven or eight years, or something like that.

Q. As Supervisor of Tracks, Mr. Crance, state whether or not your duties called you or put you in touch with the men on the section and with the section foremen?

A. Yes, sir, I had charge of all sections on my district, and the foremen too and I instruct them in all their work and what to do.

Q. State whether or not the Chesapeake & Ohio Railway Co. on which Bryant was at work at the time he was killed or before he was killed, state whether the Chesapeake & Ohio, or where it runs in a general way; does it run into one or more States or not?

A. Yes, sir, it runs from Chicago, Illinois, to Newport News.

Q. Through Illinois, Ohio, Indiana, Kentucky and West Virginia and Virginia?

A. Yes, sir.

Q. And this shooting of Bryant occurred on the main line, I believe?

A. Yes, sir, I understand at the toolhouse.

Q. State whether or not any interstate traffice is carried over that main line near and by the point at which Bryant worked?

A. Yes, sir, there is all kinds of interstate traffic carried over it.

By Mr. Stephenson: We object to that as irrelevant and immaterial.

[fol. 139] By Mr. Perry: I just wanted to show that it was an interstate railroad.

By the Court: You may show that it was an interstate railroad and you can note your objection if you desire.

By Mr. Perry: We would like to note an exception.

By Mr. Perry:

Q. How was Bryant employed before he was discharged; what did he do or what did he work at?

A. As a track laborer.

Q. He was a track laborer?

A. Yes, sir.

Q. Working on the main line?

A. Working on the section, yes, sir.

Q. Were you up in that neighborhood in the course of your employment at any time within a short time prior to the shooting of Bryant, if so, when?

A. I was up there on Saturday before this happened.

Q. You were on the worktrain, I believe?

A. No, sir, we were changing the line of curve, we had a heavy job there and I was there looking after it.

Q. Were you on the worktrain or were you just travelling through there?

A. I was just travelling, I was up there on a motor car, I think, as well as I recollect.

Q. What were those men engaged on at that time, when you were there?

A. We were lining a curve and filling in.

Q. Just where?

A. Right at the east end of Moore's tunnel.

Q. On Mr. Long's section?

A. Yes, sir, right west of Backbone.

Q. About how many men were at work on that job?

A. I expect I had about 50 men there that day, I don't know just exactly, but something near that.

Q. You had then other men besides Mr. Long's force at work?

A. Yes, sir, I had the extra gang, Mr. Wickline's force.

[fol. 140] Q. Was Mr. Wickline there himself?

A. Yes, sir.

Q. And Mr. Long's force was there?

A. Yes, sir.

Q. Was Mr. Long there?

A. No, sir.

Q. Who was in charge of Mr. Long's force?

A. He left Dodson in charge.

Q. He left Dodson in charge, who left him in charge?

A. Mr. Long. I passed along and his mother was dead and he had to go to the funeral and Dodson was the only suitable man he had to do the work and look after the work.

Q. Mr. Long had gone to his mother's funeral?

A. Yes, sir.

Q. And Mr. Long had left Mr. Dodson there. Is that correct?

A. Yes, sir.

Q. How long had you known Dodson in his work there?

A. I have known him ever since he was working there, about seven or eight years, or something like that, I don't know just exactly how long.

Q. State whether or not any person had ever complained to you of any misconduct on Dodson's part?

A. No, sir.

Q. Had you ever heard anything prior to this shooting derogatory or against the character of this man Dodson?

A. No, sir.

Q. It is in evidence here that Mr. Dodson was a very nervous man and an irritable man. State what had been your observation of Dodson?

A. I always thought that Dodson was a quiet sort of a fellow, he was a man that did not have any education but he was a good workman.

By Mr. Stephenson: We object to that statement, he is stating an opinion now and we move to strike it out.

By Mr. Perry: I will withdraw that question.

Q. State whether or not you had ever heard or had ever observed that Dodson was irritable?

[fol. 141] By Mr. Stephenson: We object for the same reason, heretofore stated, and because it is mingling two question together.

By the Court: I think either one would be admissible.

By Mr. Stephenson: If he knew his reputation it would be admissible, but he must show that he knew it first.

By the Court: I think it is admissible.

By Mr. Perry:

Q. What pay do section laborers get, and what are their hours of labor, I mean at the time this shooting occurred?

A. They get $2.96 a day, 37½ cents an hour for an eight-hour day.

Q. Mr. Crance, I wish you would state whether or not you know what the duties of a section foreman are, and if so, state them?

By Mr. Stephenson: We object to the question. We are only dealing with one question, and that is what their duties were. He may state what the duties of a section foreman are if he knows.

By Mr. Perry:

Q. Do you know?

A. Yes, sir.

Q. What are they?

A. The duties of a section foreman is to maintain the track assigned to him in proper line and surface, keep up what fences is on his right of way, look after the Company's property in general, keep everything in a neat and orderly manner and do the work assigned to him.

Q. It is in evidence here that Mr. Dodson told you on Saturday evening before the shooting of Bryant that he was going to discharge Bryant. State what you know of that, if anything?

A. Bryant wasn't working that day, that is, he wasn't doing his duty on the job.

[fol. 142] My Mr. Curry: We object to that.

By Mr. Perry:

Q. You mean Dodson told you that?

A. No, sir, I observed that when I was there.

By the Court: Go ahead.

A. And I called Dodson's attention to it, I said "get that man up there and get busy, we have got a terrible day's work on hand and I want to get it done," and he said "he won't do anything that I tell him," and I said "tell him to leave and draw his money, I don't want him any longer if he don't want to work."

Q. That was on Saturday afternoon?

A. Yes, sir.

Cross-examination.

By Mr. Curry:

Q. You, in fact, discharged him yourself or directed his discharge?

A. Yes, sir, I directed it.

Q. Dodson was in charge of the hands that day?

A. Yes, sir.

Q. And had been during Mr. Long's absence on account of the sickness of his mother?

A. Yes, sir.

Q. You knew about that, of course?

A. Yes, sir.

Q. Of course, Mr. Crance, how do you pronounce your name?

A. C-r-a-n-c-e.

Q. What is the extent of your division?

A. I have got 83 miles of main line.

Q. You just have general supervision of the railroad track?

A. Yes, sir.

Q. And the section foremen of course are charged with the maintenance of the whole right of way?

A. Yes, sir, they have four miles of track.

Q. And you, of course, do not stay on the work with the foremen very much or with the hands, you just go and see that they are doing the work properly?

[fol. 143] A. I am from one end to the other.

Q. As a matter of fact, I presume, you did not make any inquiry at all about Mr. Dodson's general characteristics?

A. No, sir, nothing only I have been working with him and around by him ever since he has been on the railroad.

Q. You have just had general supervision and you are there casually, but you haven't made any inquiry about his characteristics?

A. No, sir, I hadn't asked anything about him.

Witness stands aside.

C. E. Long sworn for defendant.

Direct examination.

By Mr. Perry:

Q. You live in Alleghany County, I believe?

A. Yes, sir.

Q. You were born and raised here?

A. No, sir, I was born and raised in Greenbrier County.

Q. How long have you lived in Alleghany County?

A. Ever since the 15th day of June, 1914.

Q. What has been your occupation during that time?

A. Section foreman.

Q. For the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. What was your section?

A. Backbone, Va., Section 106.

Q. You are the Mr. Long that they have mentioned in this evidence as being section foreman in charge of the section where Dodson shot Bryant?

A. Yes, sir.

Q. How long had you known Dodson?

A. I have known him ever since July 1st, 1919.

Q. How did you happen to come to know him then?

A. He came out there and got a job from me on the section.

Q. Doing what?

A. Doing track work, a laborer under me.

Q. How long did you know Bryant?

A. I have known Bryant for about two years.

Q. How did you come to know him?

A. He came the same as Dodson to get a job as a laborer on the tracks.

Q. He was a laborer on the section?

[fol. 144] A. Yes, sir.

Q. Up to the time of Bryant's discharge was Bryant working as a section laborer on the section there?

A. Yes, sir.

Q. How many days on an average during the year would section men like Bryant labor?

A. He would labor something like about 20 days along like that, or 22 or 23 days, he didn't work exactly every day.

Q. I suppose in very rainy and inclement weather when the work could not be done, the track force did not work?

A. No, sir.

Q. How much did Bryant get per day?

A. He got 37 cents an hour or $2.96 a day for eight hours work.

Q. I do not believe you were in charge of your work or present on your work at the time this thing occurred?

A. No, sir.

Q. How did that happen?

A. I lost my mother at that time, she was ill for sometime, and I was called away to her death and burial.

Q. This shooting occurred on Monday. What day were you called way?

A. I was called away on Thursday before that.

Q. Were you called away while you were at work?

A. Yes, sir, while I was at work.

Q. What work were you on at that time?

A. I was changing some tracks up there, changing the line, you know and we were silling and surfacing.

Q. When you say silling, you mean putting new ties?

A. Yes, sir.

Q. And changing the tracks?

A. Yes, sir, and lining it over to a uniform line.

Q. Was that a heavy or light job?

A. That was a pretty heavy job, yes, sir.

Q. How many men were you working the day you left on that job?

A. I don't know just exactly the number of men on that day, but I had 31 men on the payroll, counting myself and all.

Q. That included not only the men that were working on that silling job but the men that were working at the ditching and things like that?

A. Yes, sir.

[fol. 145] Q. It is in evidence here that Dodson, during the summer before the shooting, had been working for himself, that is, he was in charge of a gang. Was he ever at any time working any way but under you?

A. He was just working under my direction. I sent him out to put in ties and smooth up the general track work.

Q. He would have men under him when you would send him out?

A. Yes, sir, I allowed him to have five or six men to do this work.

Q. Judging by the results of his work and the manner in which his work was done and the manner in which he got along with the men working under him, state what Dodson's character was as a man who had charge of men?

A. He had a good character, he handled the men well, and got along with his work well, I had no objection to it whatever, he was a competent man to send out and he done his work in a safe manner.

Q. State whether or not at any time before this shooting any persons every complained to you about Mr. Dodson?

A. No, sir, nobody ever complained to me.

Q. You worked yourself with your men, didn't you?
A. Yes, sir.
Q. Did you work alongside Dodson?
A. I had Dodson on my force for a number of years, and I had no trouble with him, and there was no difficulty between him and the other men and not between me and him. His work was satisfactory, therefore I kept him in the employment of the company.
Q. State what happened on Thursday when you were called away? What did you do?
A. I got a message to come home, that my mother was dying and the Supervisor of Tracks, that is, my first superior officer, he appeared there in about an hour later.
Q. That is, Mr. Crance?
A. Yes, sir, and I told him I had this message, and that I had to be away, and I did not know just exactly how many days I would be away and I told him to get Dodson down there from up where he was doing his work with a bunch of men and turn the work over to him, so he could keep going.
Q. That is, this work that you were then doing?
A. This work I was doing, so I did that and Mr. Crance said it would be all right to do that, and he said——
Q. Never mind what Mr. Crance said to you. Did you call Dodson down?
A. Yes, sir.
Q. State to the jury what you told Dodson to do?
[fol. 146] A. I told Dodson to go ahead and change the curves in the line, they had to go over four feet off this natural bed, it had to be throwed over, and I told him to go ahead——

By Mr. Stephenson: We object to that on the ground that he stated Mr. Crance authorized the employment of Mr. Dodson in his place and stated that as an admitted fact.
By the Court: I do not think it is necessary to go into all the details of how far he was to move the track, but the objection may be overruled.

By Mr. Perry:
Q. Read the last question. (Question read.)
A. And I told him to go ahead and change this curve to

the uniform line around the curve to the grade stakes.

Q. How long would that work take with the force that you had there?

A. It would take some four or five days to complete it.

Q. What, if anything else, did you tell Dodson to do while you were gone?

A. I told him to look after the general condition of the track, the surface and line over the section, of four miles.

Q. When did you go back to work?

A. I went back to work on Tuesday, the 1st day of September.

Q. Tuesday following the Thursday that you left?

A. Yes, sir.

Q. During all this time this man Dodson worked there for you and with you did you observe him having any fight or did you ever hear of him having any fight?

A. No, sir.

Q. The evidence here is that on one occasion, shortly before this shooting, you told the track hands of an occurrence at Dodson's house the night before, that Dodson shot through the window. Please state to the Court and jury anything you know in regard to that matter?

A. Dodson stated that he heard the dogs barking and he had two dogs there and he said he heard something around that was interfering around about the house, and where his bed sat in his room there was just a screen window between it and he just shot out of the window two or three times to scare anything that was there away.

[fol. 147] A. Did you see him shoot?

A. No, sir, I was in one room and he was in another, but I heard him shooting.

Q. State whether or not you told either Dolph Wright or Taylor Thompson or Sam Wright that Dodson was a dangerous man?

A. No, sir.

Q. State what, if anything, you said in regard to danger?

A. All I said in the way of danger was I said if any of them happened to go around his place, it would be well enough to call out or make some alarm.

Q. You stated that it was dangerous to go around there at night?

A. And make no alarm, that it might be possible that he would take you to be something or other or somebody trying to get in or varmints or something or other, and he might shoot out that way to scare whatever it was and he might hit somebody.

Q. You meant that it was not a safe place or it was not a good place to go around at night without warning?

A. No, sir.

Q. How long did you stay in the same house with Dodson?

A. Some three or four months.

Q. During that time how often did this shooting occur?

A. Just once that I know of.

Q. It never occurred at any other time?

A. No, sir.

Q. Did you give Dodson any authority to police or guard the railroad tracks against trespassers?

A. No, sir, he had none.

By Mr. Stephenson: We object to the question and move to strike the answer out.

Motion overruled. Plaintiff excepts.

Cross-examination.

By Mr. Stephenson:

Q. Mr. Long, it is a fact that he had policed or carried a gun with your permission and knowledge, isn't it, in his duties. Isn't that right?

A. While he was watching he did, that is, before and when he was not in charge of any body of men.

[fol. 148] Q. He was carrying a gun and policing Moore's Tunnel or guarding it?

A. He was watching Moore's Tunnel, he wasn't guarding it from trespassers, he was watching it in case any rocks fell.

Q. And he was carrying a gun at that time?

A. He carried a gun at that time.

Q. He was working for you, wasn't he?

A. Yes, sir.

Q. And that was just a short time before this transaction?

A. That was a good while before.

Q. The same summer wasn't it?

A. It was during the winter.

Q. During the preceding winter?

A. Yes, sir.

Q. You and him during that summer of 1925, lived there at his house together at Backbone, didn't you?

A. Yes, sir.

Q. Just you and he?

A. Yes, sir.

Q. In his house?

A. Yes, sir.

Q. Batching you might say?

A. Yes, sir.

Q. And during that summer you were the section foreman and you had a crowd of men working on the section and he had another crowd of men working on the section, isn't that right?

A. He had a bunch of men, I sent a bunch of men out with him, out to do the work.

Q. He took his crew and went up and worked them all day and came in at night just as you did?

A. Yes, sir.

Q. And he had complete control of the men, didn't he?

A. Yes, sir.

Q. No question about that; and it is a fact that he discharged some of these men, isn't it?

A. Yes, sir.

Q. He had that authority to discharge them?

A. Yes, sir.

Q. Just as you had; the men he discharged were Snead and Matheny, at least they were two of them?

A. I don't know whether he discharged Matheny, or not, but he discharged Snead.

[fol. 149] Q. And he had authority to hire and employ and discharge the men just as you had?

A. Yes, sir.

Q. That was just a short time before he was put in charge of the whole crew, wasn't it?

A. Yes, sir.

Q. That is a fact, that the discharging of these men took place. Is that right?

A. Yes, sir.

Q. Isn't it a fact, or not, that during the summer or during the preceding month before your mother's last illness and death, that you were off at home a number of times?

A. Yes, sir, I was off at home.

Q. And when you were away on these occasions Mr. Dodson was in charge of the section hands, wasn't he?

A. Yes, sir, he took charge of the entire force.

Q. That is correct?

A. Yes, sir.

Q. He was a sub-foreman and had been for sometime, hadn't he?

A. He worked some three or four months, or something like that.

Q. As a sub-foreman?

A. Yes, sir.

Q. And when you were away on a number of visits, about how many times, do you recall, you were called home or went home to visit your mother, or that you were away that summer?

A. There is no record kept of the time, but sometimes once a week and sometimes maybe twice a week.

Q. At any rate, it was very often?

A. About an average run would be once or twice a week.

Q. And you would be gone a day or two at a time?

A. No, sir, I would be gone a day and maybe a part of another day or something like that.

Q. You went over in West Virginia to visit your mother?

A. Yes, sir.

Q. And that occurred during a month or six weeks previous to the killing of Bryant?

A. Yes, sir.

Q. And during that time Dodson was in charge?

A. Yes, sir.

Q. Now on this particular occasion when you went away, on Thursday before Marshall Bryant was killed, you expected to be gone sometime, didn't you?

[fol. 150] A. Yes, sir, I was figuring to be gone——

Q. Indefinitely?

A. I don't know about that, I did not know when I would be able to get back.

Q. You thought that she was seriously ill and might last some time?

A. Yes, sir, might last for a week or more.

Q. And you expected to stay at your mother's bedside?

A. Yes, sir.

Q. On that occasion, as you have told the jury I think, Mr. Crance was there on that Thursday and you talked to him at Moore's Tunnel?

A. Yes, sir, I talked to him right on the works.

Q. And you told him you had to go?

A. Yes, sir.

Q. And you asked him about putting Mr. Dodson in charge. Is that right?

A. Yes, sir.

Q. And he said that was all right?

A. Yes, sir.

Q. And then you left and Dodson was put in charge of the whole crew. Is that right?

A. Yes, sir.

Q. That is absolutely right?

A. Yes, sir.

Q. And it was the general custom, as you have stated, of yourself and others to employ and discharge men?

By Mr. Perry: I object to the question because he has not said it was the general custom of himself and others. He said what he did himself.

By Mr. Stephenson:

Q. On your section that was the general custom for you to employ and discharge men, wasn't it?

A. Yes, sir, if a man didn't give satisfaction we did not want him.

Q. And that was the general custom on the railroad everywhere, wasn't it?

By Mr. Perry: I object to that.

[fol. 151] By the Court: It doesn't make any difference what the general custom on the road everywhere was, the question is what was Dodson's power and authority there, at this time, and you will confine it to that. This witness has testified that Dodson had the power to hire and discharge men.

By Mr. Stephenson:

Q. You had that power and that was your instructions?

A. Yes, sir.

Q. From your superior, Mr. Crance?

A. Yes, sir.

Q. Mr. Crance has charge of the entire Maintenance of Way from Clifton Forge to where?

A. To Hinton.

Q. And you were under him?

A. Yes, sir.

Q. He had charge of all track operations, didn't he?

A. Yes, sir.

Q. Now Mr. Long with regard to the question of the shooting up there that night, didn't he shoot out there more than once at night?

A. More than one night, you mean?

Q. Yes, sir.

A. Not that I know of, not but one night.

Q. You only know of the one night?

A. Yes, sir.

Q. And didn't you say to the men on the next day that Dodson was awfully nervous and it was dangerous and unsafe to go about him up there at night?

A. Dangerous and unsafe?

Q. Yes, sir.

A. No, sir, I didn't say that, unless they let themselves be made known.

Q. You meant that he was shooting at any kind of a noise or what he might think was a shadow or anything like that?

A. What he told me himself, he said that there was something around about the house and he didn't say whether it was a man or an animal or a varmint or what it was, and he would shoot out, he said, to scare it away.

Q. You were right in the room with him?

[fol. 152] A. No, sir. I was in another room from him, but I was in the same house.

Q. That was just an imagination of his wasn't it?

A. I suppose it was. I thought it was an imagination of his.

Q. He just heard something and he got up and banged loose through the screen?

A. I don't know that he had seen anything.

Q. He didn't claim to have seen anything, did he?

A. No, sir, he didn't claim to have seen anything whatever, but it might be that he thought he would scare it away.

Q. He shot several times?

A. Two or three times.

Q. He kept a gun near him all the time, didn't he?

A. He had a gun all the time at the house.

Q. And you were really warning the men not to go about there because you thought it would be unsafe and he might crack down on them. Is that right?

A. Warning them not to go there unless they let themselves be known.

Q. Because he was nervous and excitable, that is a fact, isn't it?

A. You take anybody, if he heard a racket around there, or something or other that they couldn't tell what it was, they are going to investigate somehow or another.

Q. Wasn't it because he was nervous and excitable and banging loose there at nothing, that you told them they had better stay away?

A. I cannot say he was nervous and excitable.

Q. Didn't you tell them he was nervous and excitable and a dangerous man and to stay away from there?

A. Not unless they let themselves be known.

Q. Unless the men came up and told him who they were, of course, it would be safe then?

A. Yes, sir.

Q. And if they didn't do that it would be unsafe?

A. I meant to let themselves be known if they came to the house, but that if anything happened to be prowling around the place, it might be unsafe.

Q. And might you not have said and didn't you say to these men when talking about this matter that he was highly nervous and a dangerous man, didn't you say that?

A. No, sir, I didn't say he was a dangerous man.

Q. You might have said that, might you not?

[fol. 153] A. No, sir, I cannot say that I might have said it.

Q. Didn't you say he was an awfully nervous man and liable to shoot somebody?

A. I didn't say he was nervous. I said if anyone was prowling around there, he might accidentally shoot.

Q. Might accidentally shoot?

A. Yes, sir, he might.

Q. You don't mean to tell the jury that the night he let loose and shot two or three times that was accidental?

A. No, sir, that wasn't accidental.

Q. He was just shooting at something that was supposed to be there and that wasn't there?

A. I don't know whether he shot at it or not, it might have been a way off.

Q. There wasn't anything there that you heard or saw?

A. No, sir, nothing that I saw.

Q. Is that house in sight of any other houses there?

A. No, sir.

Q. It is pretty close to the tracks, isn't it?

A. Yes, sir, tolerably close.

Q. How close?

A. Something like about 300 yards.

Q. About 300 yards from the main line track?

A. Yes, sir.

Q. You and Mr. Dodson were on very intimate terms, weren't you?

A. We were good friends, we had no trouble, no reason to be any other way.

Q. You had worked together a long time?

A. Yes, sir, ever since July 1, 1919.

Q. And the relationship between you was such that anything that you did he thought was all right, and anything he did you thought was all right? Wasn't that about right, now?

Objection. Overruled. Exception.

Q. Isn't that right?

A. He could do wrong, sure, he could do wrong.

Q. I am talking about before this killing occurred, you thought anything that Dodson did was all right, didn't you?

A. Provided it was all right.

[fol. 154] Q. And you thought anything that he would do was all right?

A. I thought he would do what was all right. I never seen him do anything else previous that wasn't all right.

Q. He thought you were all right?

A. Yes, sir, I treated him right.

Q. You were just as intimate as two men could be, ain't that right?

A. Sure, we were friends as far as that is concerned, and we worked together.

Q. And I say as friends and comrades you were just as intimate as two men could be, weren't you?

A. Yes, sir, so far as right went.

Q. I am not saying that there is anything wrong about that, I don't mean to infer that at all, but you were living in his house, you and him together?

A. Yes, sir.

Q. On most intimate terms. Hadn't you had a little flare up with Dodson on a few occasions, didn't he flare up at you a few times?

A. No, sir, not particularly.

Q. I mean any time, hasn't he, now?

A. No, sir, he hadn't himself at all.

Q. I am talking about him now?

A. No, sir.

Q. Didn't he get sore at you on one or two occasions?

A. No, sir, not that I know of.

Q. You think not?

A. No, sir, he never got sore at me.

Q. He was a man that did not get along amicably and nicely with other men though, did he?

A. He did while he was under me.

Q. Wasn't he of a type of man that was irritable and quick tempered and had trouble with other men that he worked with?

A. No, sir, not while he was working with me.

Q. Wasn't he a man of a disturbing nature and had something wrong with him that made him irritable?

A. He always claimed he had a weak stomach.

Q. And that affected his disposition, didn't it?

A. I suppose maybe it would to a certain extent, but it did not affect him in his ability to work.

Q. But it made him at times grouchy and peculiar, didn't it now, or something like that?

A. It did not interfere with me or the men a particle in the world, that I know of.

[fol. 155] Q. I understand about his work, but I said there was something else that made him grouchy and peculiar?

A. If it did, it did not bother anybody.

Q. I am not saying that, or not, but that did happen, didn't it?

A. I cannot say that it really did happen because you may be out here and not have much to say to the men, but you cannot tell whether he is mad with anybody or whether his feelings is the cause or what.

Q. And he was that kind of a man, sometimes he was grouchy and sometimes he wasn't isn't that right?

A. Sometimes he didn't have as much to say as at other times, but you and me would be the same way.

Q. He was peculiar that way?

A. No, sir, he was not peculiar all the time that way.

Q. I don't mean he was all the time, but at times, and very often he was kinda grouchy?

A. No, sir, not often.

Q. But he was grouchy?

A. Not often.

Q. Not often?

A. No, sir.

Q. You just now said in answer to my question that he wasn't all the time, what did you mean by that by saying he wasn't grouchy and peculiar all the time, what did you mean by that?

A. According to what you are trying to drive at, you would think he was regularly a bull-head all the time, but he wasn't a man of that type.

Q. He wasn't a man of that type all the time?

A. No, sir.

By Mr. Perry: He didn't say all the time, he said he wasn't a man of that type.

By Mr. Stephenson:

Q. He was that way sometimes?

A. He wouldn't have much to say sometimes, but it did not interfere with his work and duties at all.

Q. At those times, if you did not let him alone, he was irritable and stubborn, wasn't he?

A. No, sir, he didn't bother me a bit, it might have been bothering him, but it wasn't bothering anybody else that I ever saw.

[fol. 156] Q. The truth of the business is you would say that he was a satisfactory worker?

A. Yes, sir, he was a satisfactory worker.

Q. You knew of his peculiarities, as everybody else knew them, didn't you?

A. I understood him.

Q. Because you had been long with him there for years, yes, you understood him, you knew him that way, didn't you?

A. Yes, sir, I knew him.

Q. You knew it wouldn't do to fool with him when he was stubborn and irritable?

A. There was no feeling between me and him.

Q. You knew when he was not feeling good and nervous as he frequently was, wasn't he frequently nervous and irritable?

A. Not frequently.

Q. But sometimes he was?

A. Sometimes he wouldn't have much to say.

Q. And at those times you knew it wouldn't do to fool with him?

A. It didn't bother me at least, he done what I told him in that case as much so as he did in any other case, he done what I told him to do in those cases as well as he did any other time.

Q. But as you have stated just now you on those occasions laid off him and did not bother him?

A. No, sir, I did not make any statement of that kind.

By Mr. Perry: That is what you stated, Mr. Stephenson.

By Mr. Stephenson: Wait a minute, Mr. Perry. Let me ask the witness a question.

Q. When you were working there, before he took charge on Thursday, Mr. Bryant was on your section all the time?

A. He was working in my gang.

Q. He wasn't working under Dodson all of this time, was he?

A. He had worked with Dodson.
Q. He had worked with him some?
A. Yes, sir.
Q. But he was usually in your gang?
A. Usually in my gang, yes, sir.

[fol. 157] By Mr. Perry:

Q. Mr. Long where is Moore's Tunnel?
A. Mile Post 301.
Q. That is west of Backbone?
A. Yes, sir, about three-quarters of a mile west of Backbone.
Q. How long is Moore's Tunnel?
A. About 500 feet through it.
Q. And that country where Moore's Tunnel is, is it a mountainous country or a good level open country?
A. It is mountainous.
Q. Is it thickly settled or very sparsely settled?
A. Around there in half a mile of the place there is nobody lives at all.
Q. When Dodson was the watchman for rocks, there, was he the day or night watchman, or when was he on duty?
A. He was on duty as the night watchman.
Q. I understood you to say that you permitted him to carry a pistol out there on that mountain?
A. He carried it himself. I did not permit him to do it.
Q. What was the purpose of the pistol?
A. I suppose to protect his own self.
Q. Did it have anything to do with watching for trespassers or anything like that?
A. No, sir, nothing whatever.
Q. Was that a dangerous tunnel for falling rock?
A. Yes, sir, it was at that time.
Q. Mr. Stephenson, in his cross-examination of you has apparently insisted that Dodson was a man who at times was a good man to lay off of, what about that?
A. I don't see where there was any harm in the man whatever at any time.
Q. Did he give the appearance of a dangerous man at any time?
A. No, sir, he did not.

Q. Was there any indication to you that he was a dangerous man at any time?

A. No, sir, not in any way.

Q. He has tried to have you say that he was a man that had a constant grouch?

A. Yes, sir, but that won't work, at times he would have little to say, as I said before, but it did not interfere with [fol. 158] the work and it did not interfere with me, he was obedient to do what I told him to do in those cases, as I stated to Mr. Stephenson.

Q. Did he interfere in any way with other people that were working there?

A. No, sir, he didn't interfere with them at all.

Q. Mr. Stephenson has spoken of him as being a sub-foreman. Is there any employment known as a sub-foreman on your section?

A. Not at the present time.

Q. Who appointed Dodson to the position of sub-foreman, or what does it mean?

A. He did what I told him to do.

Q. He was doing the work that you put him to do?

A. Yes, sir, I gave him charge of this body of men and sent him up there.

Q. He was subbing for you?

A. Yes, sir.

Q. And not by appointment from the Supervisor?

A. Not up until this last time when I was called away.

By Mr. Stephenson:

Q. He worked there several months as a sub-foreman or assistant foreman, didn't he?

A. He done it under me, under my direction.

Q. He was there for some time doing that?

A. He was doing that between three and four months.

Q. And Mr. Crance would come along and oversee the work while he was doing it?

A. Yes, sir.

Q. He knew all about that?

A. Yes, sir.

By Mr. Perry:

Q. When he was subbing that way, what pay did he get, the pay of a foreman, or what?

A. No, sir he got the same pay as a laborer.
Q. He got the same pay as a laborer?
A. Yes, sir, 37 cents an hour.
Q. And the track hands' pay is 37 cents an hour?
A. Yes, sir.
—. You spoke of this sub-foreman hiring and discharging hands. Do you mean when Mr. Dodson was there, that you were there hiring hands?
[fol. 159] A. No, sir, he didn't hire any hands while I was there, I hired them myself?
Q. But he could fire the men in his gang?
A. Yes, sir, if he didn't give satisfactory service.

By Mr. Stephenson:

Q. Mr. Long, Marshall Bryant was a good worker while he was in your gang?
A. Yes, sir, while he worked for me, he worked very well. I had no kick on his work.
Q. He was not quarrelsome or a fussy man, was he?
A. No, sir.

Witness stands aside.
Defendant rests.

By Mr. Perry: If your Honor please, this is a question of law, pure and simple, and we will demur to the evidence.
By Mr. Curry: We join in the demurrer.

IN THE CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

DEMURRER TO EVIDENCE

And the plaintiff, by his attorney, to maintain the issue on his part, produced to the jury, the following evidence, namely:

(See plaintiff's evidence hereinafter set out in full, page 10 to page 189, both inclusive.)

[fol. 160] And the defendant, by its attorney, to maintain the issue on its part, produces to the jury the following evidence, namely:

(See evidence of defendant hereinafter set out in full, pages 190 to 227.)

Which evidence for the plaintiff and defendant respectively is in a separate paper, marked "O. J. P., Clerk" for identification but it is to be considered as if here set forth at large; and this being all of the evidence, as well for the plaintiff as well as for the defendant, the defendant says that the aforesaid matters to the jurors aforesaid in form as aforesaid shown in evidence are not sufficient in law to maintain the issues joined on the part of the said plaintiff, and that the said defendant is not obliged by the law of the land to answer the same. And this it is ready to verify.

And specifying the grounds of its said demurrer the defendant states:

1. It is not shown that the defendant was guilty of any negligent conduct proximately causing the injury to the plaintiff's intestate as charged in the declaration.

2. The injury to the plaintiff's intestate was not the proximate result of any neglect of duty owing by the defendant to the plaintiff's intestate.

3. That the shooting of the plaintiff's intestate by Dodson (who was the person referred to in the plaintiff's declaration as the defendant's foreman) was not within the scope of said Dodson's employment by the defendant and was not in the prosecution of the defendant's work and was a matter for which the defendant was in no wise responsible.

4. That the plaintiff's intestate was discharged from the defendant's employment on Saturday prior to the Monday of the shooting complained of, and not on said Monday, and said Dodson shot the plaintiff's intestate in the course and as the result of a private quarrel or misunderstanding, and not as a part of and in the course of said Dodson's employment.

5. That at the time of the intestate's injury the defendant was a common carrier engaged in Interstate Commerce and the employment of the intestate by the defendant and of the defendant's foreman, alleged in the declaration were in Interstate Commerce; and the injury to the intestate did not result in whole or in part from the negligence of any officer, agent, or employee of the defendant, or by reason of any defect or insufficiency due to its negligence in its [fol. 161] cars, track, road-bed, work, or other equipment: whereby any cause of action has enured to the plaintiff against the defendant under the law governing such employment and engagement in Interstate Commerce.

6. It does not appear from the evidence that the said Dodson was of a dangerous, vicious, or homicidal character, or that he would become dangerously angry and it does not appear that the defendant had notice or knowledge, or that it could, by the exercise of reasonable care have known that said Dodson was dangerous, vicious, or homicidal, or that he would become dangerously angry.

7. That the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate or in the course of said Dodson's employment or within the scope of his duties.

Wherefore, for want of sufficient evidence in that behalf shown to the jury in evidence as aforesaid, the defendant prays judgment and that the jurors aforesaid be discharged from giving any judgment upon the issues aforesaid, and that the plaintiff be barred, etc.

—— —— Attorney for Defendant.

In Circuit Court of Alleghany County

Instructions to Jury

By the Court: Gentlemen of the jury, you are relieved at this point of considering this case upon its merits and

your only office now is to ascertain what amount of damages the Chesapeake & Ohio Railway Company should pay to Bryant's Administrator for the death of Bryant, provided the Court on the law of the case is of the opinion that the Railway Company is liable. That has been shifted from you all to me, so that the Court instructs you as follows:

That they have no matter whatever to consider in this case except to ascertain the amount of damages that the plaintiff, subject to the opinion of the Court upon the defendant's demurrer to the evidence, is entitled to recover in this case; and the Court tells the jury that in ascertaining the damages plaintiff is entitled to recover, they should find the same with reference:

1. To the pecuniary loss sustained by Orie Bryant, the widow of the deceased, and by Mason H. and Arthur L. Bryant, the infant children of the deceased, fixing the same at such sum as would equal the probable earnings of the de- [fol. 162] ceased, M. L. Bryant, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed;

2. By adding thereto compensation for the loss of his care, attention, and society for his wife and children;

3. By adding such further sum as they may deem fair and just by way of solace and comfort for said wife for the sorrow, suffering, and mental anguish occasioned to her by his death, the damages to be fixed at not more than ($10,000.00) Ten Thousand Dollars, the amount claimed in the declaration; and

4. The Court tells the jury that in ascertaining the possibility of the lifetime of the deceased, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

And I may add that when you go to your room to consult of your verdict you will not consider at all whether the railway company is liable, you will consider this question, if the railroad company is liable, how much ought they to pay, and put that into your verdict, and I have made out a form

of verdict which will be handed to you along with the instructions of the Court. Counsel will now want to talk to you a little while as to what we call the measure of damages or the amount of damages that they contend you ought to allow. This is a case, in which the railroad company, as we call it, demurs to the evidence, that is, they put it up to me to say whether or not the railway company is liable and up to you to say how much you think they ought to pay.

[fol. 163] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 164] Minute entry of argument and submission September 15, 1927, omitted in printing.

[fol. 165] IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

BRYANT'S ADMINISTRATOR

OPINION—Jan. 19, 1928

MARTIN P. BURKS, J.:

For some years prior to August 31, 1925, Marshall L. Bryant and Con F. Dodson had been working together as section hands on the Chesapeake and Ohio Railway. On the date mentioned, Dodson, who was acting foreman of the gang, shot and killed Bryant, and this action was brought by Bryant's administrator against the railway company to recover damages for his death.

There were two counts in the declaration, one charging that Bryant was an employee of the defendant, and that the killing by Dodson was "in the course of his employment or within the scope of his authority," and the other that Dodson was an unfit and dangerous person to act as

foreman, and that the death of the intestate was caused by the defendant's negligence in employing and keeping Dodson in the service, when it knew, or ought to have known, that he was an unfit and dangerous person to be in charge of its section hands.

When the evidence was all in, the defendant demurred to [fol. 166] the evidence, and the plaintiff joined therein. The jury assessed the plaintiff's damages at $8,000, and the trial court overruled the demurrer, and entered up judgment for the plaintiff against the defendant for the $8,000 and the costs.

The homicide took place on Monday in the presence of a number of witnesses who testified in the case, and there is some variation in their testimony as to what took place at the time of the shooting, but the variations can not properly be called conflicts, and it is said that the defendant did not by his demurrer waive these conflicts. This may be true, but, on a demurrer to the evidence, the demurrant is taken as admitting all inferences that a jury might fairly draw in favor of the demurree from his evidence. If an inference favorable to the demurree might be fairly drawn from any portion of his evidence though that evidence was not entirely harmonious and consistent, the jury may draw it, and whatever inference the jury might have fairly drawn, the court must draw.

Viewing the case from the standpoint of the demurrer to the evidence, there was evidence to support, and the jury might have found the following as the principal facts of the case: The defendant, the plaintiff's intestate and Dodson were all engaged in interstate commerce at the time of the discharge of the intestate. On Saturday before the [fol. 167] homicide, Dodson was foreman of the section gang, and the intestate was a workman under him, employed by the day, and that Dodson had authority to discharge Bryant, and did, in fact, discharge him; that on Monday morning, at the usual hour to commence work, Bryant went to the section house from which they were to start, carrying his dinner bucket with him; that the lever-car to carry the men and tools to the place of work was placed on the track; that Bryant put his dinner bucket on the car and went to the tool-house and got a pick or shovel and placed that on the car; that at this juncture Dodson ordered Bryant away in language variously expressed by the witnesses, such

as, "I ain't got anything for you to do"; "Go on away, I told you, Bryant, I wouldn't work you any longer"; "Fellow, I don't need you any longer"; "I have just fooled with you long enough, you get away from here"; "I told you I wasn't going to work you any more, just get on up the road"; that Bryant did not leave; that Dodson drew his pistol and Bryant asked him what he was going to do with it, and remarked that he would make him eat it; that Bryant was standing at the opposite end of the car from Dodson, but did not make any advance towards him, or any effort to strike him, but stood there with his hands down, [fol. 168] with gloves on them, and was not armed in any way; and that Dodson fired several shots at Bryant at a distance from eight to twelve feet, and that Bryant died from his wounds three days thereafter. There was also abundant evidence to justify a finding by the jury that Dodson was a nervous, quick tempered man, hard to get along with and unfit to have charge of a section force, but not that he was dangerous, or that such was his reputation in the community. It also appears that Long, the foreman who appointed Dodson his substitute in his absence, knew of Dodson's disposition, and that he carried a pistol.

It is admitted by the plaintiff's counsel that, at the time of the shooting, the defendant and Dodson were engaged in interstate commerce; that the intestate was also engaged as a laborer for the defendant up to the time of his discharge; that the Federal Employers Liability Act applies to employees so engaged and is the exclusive law applicable to employees so engaged; and that said act is applicable only to negligent acts by which such employees are injured, and does not apply to wilful injuries. Whether or not the Federal act, therefore, is applicable is dependent on whether Bryant was an employee of the defendant on Monday, August 31, 1925, the day of the shooting.

[fol. 169] Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, Dodson testified that he discharged him on the previous Saturday. On a demurrer to the evidence, this fact must be accepted as established. It is unnecessary, therefore, to make any further reference to the able

argument of counsel and the cases cited by them, on the questions above mentioned. Counsel agree, except as to the time of the discharge, and this is concluded, on a demurrer to the evidence, by the testimony of Dodson. There are no conflicts of evidence on a demurrer to the evidence. The concessions made by the demurrer eliminate the conflicts. Bryant was not an employee of the company at the time of the shooting.

The case, therefore, is controlled by the State statute.

The chief question involved is, was Dodson acting "in the course of his employment or within the scope of his authority" when he shot Bryant?

We have no evidence of what took place on Saturday but the testimony of Dodson, a witness called by the plaintiff, except as hereinafter stated. He testified that when they [fol. 170] quit work on Saturday, "I walked down the track and he walked up beside me. He said, 'are you going to town this evening?' I said I had thought I would, and he just made the remark, he said, 'I want to see you when I get to the tool house. I am going to beat hell out of you.' I said, 'Marshall I don't want any trouble with you,' and I said 'after this evening remember I don't work you any more.' I said 'you don't work any more after this evening.' "

"Q. What was his reply?

"A. He just made the remark, 'if you cause me to lose my job, I will kill you.' "

There was testimony also of a threat made by Bryant against Dodson on Monday morning before the shooting, but there is no evidence that this threat was communicated to Dodson.

Dodson's account of what took place on Monday morning was as follows:

"Q. Now tell me what occurred on Monday morning when you started off with your tool car?

"A. He was getting his stuff out and I said, 'Marshall, I have refused to work you any more.'

"Q. Had Bryant brought his tools or anything to the tool [fol. 171] car at that time?

"A. He went to the tool house and got a pick and brought it out. I said, 'I refuse to work you.'

"Q. Then tell what occurred.

"A. He says, 'I don't pay no attention to you. Mr. Long will have to tell me.'

"Q. Who was Mr. Long? The regular section foreman?

"A. Yes, sir.

"Q. Go ahead and tell what happened.

"A. He just made the remark, he said, 'I will give you what I promised you,' and started on right around the car to me. When I drew my gun he said, 'What are you going to do with that damn thing? I will make you eat it.'

"Q. When he said, 'Mr. Long hired me and will have to fire me,' or words to that effect, where was he standing? Where was Bryant standing?

"A. He was coming around the car to me.

"Q. And you were on the track by the side of the car?

"A. I was on the west bound side.

"Q. The car was between you two?

"A. It was at the time he first came out and he came [fol. 172] right on around the east end of it.

"Q. You say he had started to come towards you?

"A. He was coming around the car to me.

"Q. And said he would do to you what he had promised?

"A. Yes, sir.

"Q. What did you say?

"A. I never said anything.

"Q. What did you do?

"A. I drew my gun.

"Q. You came there that morning with a gun in your pocket?

"A. Yes, sir.

"Q. And you drew it. Did Bryant stop when you drew the gun?

"A. No, sir.

"Q. What did he do?

"A. He just said, 'What are you going to do with that damn thing? I will make you eat it.'

"Q. What did you do then?

"A. I put it to work.

* * * * * * *

"Q. At the time you told Bryant on Saturday you [fol. 173] wouldn't work him any more, was anybody else near you?

"A. No, sir. We was walking down the track alone. The rest of the crew was back up the track.

* * * * * * *

"Q. I understand you had no ill feeling against this man Bryant?

"A. No, sir, I did not.

"Q. If you don't have any ill feeling against him why did you shoot him?

"A. Well, except he made those threats I was just protecting myself."

Other witnesses for the plaintiff give in detail what occurred at the time of the shooting. Quite naturally some of them recalled things that others did not, but piecing together what any and all of them recalled, their account of what transpired was substantially as follows: About seven o'clock on Monday morning, when the gang were about to start out from the tool-house, Bryant came to the tool-house with his dinner-bucket, and Dodson said to him, "I haven't got anything for you to do." Apparently Bryant did not hear him and went to the tool-house and got his tools and [fol. 174] brought them and placed them and his bucket on the lever-car, and was ready to step on the car when Dodson told him again he didn't have anything for him to do, and to "get away from here." Bryant did not go but said, "I will give you what is coming to you this morning," but was not in striking distance of Dodson and did not advance towards him. Dodson then pulled his pistol and pointed it at Bryant, and Bryant said, "What are you going to do with that thing? I will make you eat that thing," and immediately Dodson began shooting. We have no detailed account of what was the origin of the trouble resulting in the dismissal of Bryant on Saturday. Only one other witness besides Dodson refers to what took place on Saturday. This witness testified that he heard Dodson tell Bryant on Saturday, "If you keep on yapping around here, you won't have anything to do."

The case is one of great difficulty. Courts have gone so far in holding masters, especially corporations, liable for the wilful, malicious or intentional wrongs of their servants that it is difficult to ascertain the safe and proper line of demarcation between liability and non-liability of the master. No general rule on the subject has yet been formulated, and it is generally said that each case must be decided on its own facts and circumstances, considering the [fol. 175] character of the employment and the nature of the wrongful act. 18 R. C. L. 796.

There are cases where the departure of the servant from the service he was engaged to perform is so manifest that reasonable men could not differ in opinion upon the subject. On the other hand, there are cases where it is equally plain that there has been no such departure. Kidd v. De Witt, 128 Va. 438; Richie v. Waller, 63 Conn. 162, 38 Am. St. Rep. 361; Pittsburgh &c. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675. Between these two lies the great body of cases where the liability of the master is dependent upon whether or not the act of the servant was within the scope of his employment, and the evidence is such that fair minded men might entertain different opinions. This class of cases presents a question of fact to be determined by a jury under proper instructions from the court.

Scope of employment means in the course of the employment and in furtherance of it. If the act of the servant is done while the servant is engaged in the master's business, and with a view to the furtherance of that business and the interest of the master, it is within the "scope of the employment," and the master is liable whether the act of the servant was done negligently, wantonly or wilfully. Rounds v. Delaware &c. R. Co., 64 N. Y. 128; Huffcut, Agency, sec. 252, pp. 306-7.

[fol. 176] Some of the earlier cases held that the master was not liable for the malicious and intentional torts of the servant, although committed in furtherance of the master's business, on the ground that the wilfulness or malice, of itself, established a departure from the service, and that the servant was acting upon some independent and personal motive of his own. Wright v. Wilcox, 19 Wend. (N. Y.) 343, Huffcut, Agency, sec. 306, and cases cited. But this doctrine

has been long ago repudiated, and the current of authority is to the effect that the liability of the master is determined by whether or not the wrongful act of the servant was done while in the employment of the master and in furtherance of it, or the servant had stepped aside from his employment and done an independent and individual wrong. If the wrong done by the servant is of the former class the master is liable, whether it was done wilfully and intentionally or carelessly and negligently; if of the latter, the master is not liable. McCarthy v. Tenimins, 178 Mass. 378, 86 Am. St. 490; Holler v. Ross, 68 N. J. L. 324, 96 Am. St. Rep. 546; Bryan v. Adler, 96 Wis. 124, 65 Am. St. Rep. 99; Nelson Business College v. Lloyd, 60 Ohio St. 448, 71 Am. St. Rep. 729; Palatty v. Charleston &c. R. Co., 67 S. C. 391, 100 Am. St. Rep. 750. Note 16 R. C. L. 800, citing many cases; Note 54 Am. St. Rep. 750. The basis of the rule is [fol. 177] that the master has placed the servant in his place, and so long as he acts within the scope of his employment, his acts are the acts of the master, whether done negligently or wilfully. But, as said in Holler v. Ross, supra, "The rule, as it is now established by the later judicial declarations, should be held strictly within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." It is further said in that case, "Where it appears, when the plaintiff rests his case, that the act of the servant was a wilful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit."

We approve what is stated above as the current of authority, and we also approve the caution suggested by the New Jersey court in Holler v. Ross supra.

When Bryant went to the tool-house on Monday morning, he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said he expected that Dodson would discharge him. Dodson was only a temporary foreman, and when he ordered Bryant off, the latter inquired for Long, the permanent foreman who had employed him, and when in- [fol. 178] formed by Dodson that Long was at home, he said, "I will go over and see him. He hired me and if he wants to fire me, he can fire me." Under these circum-

stances, Bryant cannot be said to have been a trespasser in going to the tool-house, but he became such when informed of his prior dismissal and refused to leave. It is said, however, that Dodson was "not authorized to eject or expel trespassers." The only evidence relied on for this statement is what was said by Long in his testimony. He testified as follows: "Q. Did you give Dodson any authority to police or guard the railroad tracks against trespassers? A. No, sir, he had none." He had already testified that before leaving on the Thursday prior to the shooting, he called Dodson down and put him in charge of the gang, and was asked to "state to the jury what you told Dodson to do," and his reply was, "to look after the general condition of the track" and other details as to the work, but not one word as to his men, trespassers or other persons. The question and answer quoted could only mean that he conferred no authority upon him further than to make him foreman pro tem. As to general trespassers, it does not appear that Long had any authority himself. But a foreman who has charge of a gang of men and who is invested with the power of discharging them, necessarily has the power to require one whom he has discharged to [fol. 179] leave the premises, and, if he refuses, he may use such reasonable force as is necessary to effect his removal. This power is necessarily implied from the nature of the authority given to him. Roghan v. Moore Mfg. Co., (Wis.) 43 N. W. 669.

While Dodson may not have had authority to remove trespassers generally, he did have authority to discharge Bryant, and when he appeared Monday, under the circumstances stated, and was ordered off just as he and another one of the gang "were ready to step on the end of the car," Dodson had the right to use reasonable force to remove him, but the force used was far in excess of the necessity or propriety of the situation.

The case was heard in the trial court on a demurrer to the evidence, and upon the evidence the jury might have found that the shooting was done by Dodson while in the employment of the defendant and in furtherance of such employment and not wholly from personal motives of Dodson, and consequently we must so hold.

The right to remove Bryant, without unnecessary force, was incident to the right to discharge him, and for the

tortious manner in which the removal was effected the defendant is liable. Myers v. Lewis, 121 Va. 50.

Several Virginia cases have been cited in support of the plaintiff's right of recovery. Two of them are not in point [fol. 180] on account of the great difference in the facts, though the opinions contain expressions bearing on the present discussion. In Dupont v. Snead, 124 Va. 177, the servant was discharging the very duty he was employed to perform, and the wilful act was plainly in furtherance of the employment. In Crowell v. Duncan, 145 Va. 489, the wrongful act was unintentional. Davis v. Merrill, 133 Va. 69, accords with the current of authority. The facts of that case are stated in the opinion as follows:

"About one o'clock a. m. on October 11, 1919, the plaintiff's intestate, in company with several others in an automobile, was returning from Ocean Park to her home in Norfolk. When they arrived at the Norfolk and Western Railroad crossing on Brambleton avenue, they were stopped by the closed gates, although no train was approaching. After being called several times, the gateman, Branch A. Ford, came out of a near by storehouse with a lantern in his hand. The chauffeur asked him to please raise the gates, to which he replied, 'there is other crossings you can go over besides this one.' The chauffeur told him he didn't have time to go all over town looking for crossings, when there was no train standing there and no train approaching. Ford then left, going towards the tower and started up, mumbling something the driver could not un- [fol. 181] derstand.

"As soon as he entered the tower box he raised the gates and as the car was leaving the wood part of the crossing Ford fired three pistol shots at the rear of the car, in quick succession, one of which struck Claudia Harrell in the back, giving her a wound from which she died shortly thereafter in a Norfolk hospital.

"Ford was arrested a few hours later under a warrant charging him with murder. The officers who made the arrest and all other witnesses who saw him that night and next day, except J. T. Routten, testified that he talked and acted as a sane man, and that they saw nothing strange in his conduct. Routten thought he acted strange, and he appeared to him to be upset mentally.

"On January 21, 1920, Ford was adjudged insane and committed to the Southwestern State Hospital for proper care and observation, with instructions to the superintendent to inform the Corporation Court of the city of Norfolk from time to time of his mental condition.

• • • • • • •

"The plaintiff rests the liability of the defendant on two grounds:

"1. 'That the killing of the plaintiff's intestate by the [fol. 182] defendant's employee arose out of and was a part of a transaction between the plaintiff's intestate and the defendant company, in which the gateman, Ford, was acting for the defendant company, said transaction being within the scope of the gateman's employment.' And

"2. 'That the defendant company was responsible for the employment of a servant of the character of the gateman, when it not only knew by reason of its previous discharge of him, but might further have known by the exercise of ordinary care, that he was an incompetent and dangerous person to entrust with duties of the character in question.' "

The company was held liable for the injury. In the course of the opinion it is said: "If a person, acting for himself, wilfully and maliciously inflict an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the [fol. 183] scope of the servant's employment and duty, and it matters not whether the act of the servant is due to a lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury; and the authorities so hold." The authorities relied on are cited in the opinion and need not be repeated.

In addition to the authorities cited in that case, and those hereinbefore cited, we wish to refer especially to Roghan v. Moore Mfg. Co., (Wis.), 43 N. W. 669, hereinbefore cited, which bears a striking resemblance to the instant case. There the plaintiff was employed by the defendant's foreman, who had the power to discharge him. Upon refusal to do certain work, the foreman discharged him, and ordered him to leave the premises at once. The plaintiff replied that he would leave when he got ready, and the foreman forcibly pushed or kicked the plaintiff, and he fell down and broke his leg. He thereupon sued the master. The defendant defended on the ground that the acts of the foreman were not within the scope of his employment, but the court said:

"It is said the master is responsible for the acts of his servant only where such acts are committed within the scope of the servant's authority, or where the master sanctions and ratifies the servant's act. If the foreman was [fol. 184] authorized by the company to discharge workmen, he might lawfully use such reasonable force as was necessary to remove the discharged men from the shop. This would be necessarily implied from the nature of the authority given to him. There has been much discussion in the courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible. This principle is illustrated and applied in numerous cases found in the books. Now, suppose the corporation had been a natural person, who had selected a foreman, and given him authority to forcibly eject a workman from the shop who refused to leave when ordered to do so; and, if the principal might use necessary force to eject the discharged man, could not the foreman in charge of the shop do the same thing, and would it not be in the scope of his employment so to act? It seems to us the question must be answered in the affirmative. * * *

"It seems to us that, under the circumstances, the company should be held responsible for the injury which the foreman did while in the charge of the shop and in the exercise of the authority implied in his employment. It is

[fol. 185] conceded that, wherever the master has authorized the use of force for the accomplishment of an object, or where he could himself have lawfully used a certain degree of force for the accomplishment of such object, so that the authority of the servant in using force could be implied, the master is liable if the servant, through excess of zeal, misjudgment, or passion, use an excess force, and does an injury. We are clearly of the opinion that the foreman acted within the scope of his employment in removing the plaintiff from the shop, and that, if he executed the commands of his master with brutality, and not with due care and consideration, the master is responsible for his act."

Attention has been called to Atlantic Coast Line R. Co. v. Southwell's Admr. (October 31, 1927), 48 Sup. Ct. 25. In that case one employee of an interstate railroad shot and killed another employee of the road, and it was sought to impose liability on the railroad company on the ground that a superior employee of the two had negligently failed to prevent the killing, and it was held that such negligence was not shown by the evidence. The court said: "It would be straining the language of the act somewhat to say, in any case, that wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case, at all events, we are of opinion that there is no [fol. 186] evidence that warrants such judgment." There is nothing in the case that militates against the views we have expressed.

Upon the authorities cited, a jury would have been warranted in finding that the shooting by Dodson was in the course of his employment and in furtherance of it. On the other hand, they might well have found that it was wholly on consequence of a personal quarrel between the two men. In other words, it was a jury question, and where that is the case, the penalty for demurring to the evidence is a decision in favor of the demurree.

It is earnestly insisted by the able counsel for the railway company that there can be no judgment for the plaintiff because there is a variance between the allegation and the proof, that it is alleged in the declaration that Bryant was an employee of the defendant at the time of the shooting, while the testimony shows that he was not, that he had

been discharged on the previous Saturday. If this objection had been made at the time the evidence was offered of the discharge on Saturday, it is probable that the plaintiff would have asked leave to amend his declaration so as to conform to the proof, and the amendment would have been permitted and the case have proceeded without delay, but no such objection was made. The case proceeded as if such [fol. 187] amendment had been made, and all of the evidence was introduced that probably could have been offered under such an amendment. The case was fully and fairly tried on its merits and substantial justice has been reached. The case comes within section 6331 of the Code, declaring that no judgment shall be reversed "for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached." This statute is very comprehensive. Rinehart & Dennis Co. v. Brown, 137 Va. 670, 681.

Having reached the conclusion that the defendant is liable under the first count in the declaration, it becomes unnecessary to consider the question of liability under the second count.

We are of opinion to affirm the judgment of the trial court.

Affirmed.

[fols. 188 & 188½] In Supreme Court of Appeals of Virginia

The Chesapeake and Ohio Railway Company, Plaintiff in Error,

vs.

R. L. Bryant, Admr. of M. L. Bryant, Decd., Defendant in Error

Judgment—Jan. 19, 1928

This cause, which is pending in this Court at its place of session at Staunton, having been fully heard but not determined at said place of session; this day came here the

parties by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defence herein.

Certificate to foregoing paper omitted in printing.

[fol. 189] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION OF THE CHESAPEAKE & OHIO RAILWAY COMPANY FOR REHEARING

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, The Chesapeake & Ohio Railway Company, respectfully prays that the Court will rehear its judgment, entered in the above entitled matter on the nineteenth day of January, 1928, affirming the judgment of the Circuit Court of Alleghany County in favor of M. L. Bryant's Admr., and against your petitioner.

The grounds upon which the rehearing is prayed are:

I

The Court has held that the plaintiff's intestate was discharged from the defendant's service on Saturday, August 29, 1925; that the section foreman's implied right to remove Bryant, thus discharged, from the master's premises, inci-
[fol. 190] dent to his authority to discharge, persisted over a space of two days after the discharge, including an intervening day's work from which the discharged employee was absent, until the time of the shooting, August 31, 1925, and that the defendant's foreman did the shooting in the exercise of such implied authority.

It is respectfully submitted by the defendant that such implied right to remove the discharged employee from the master's premises, which is merely incident to the act of discharge, could not continue after August 29th, when the intestate was discharged and actually left the defendant's premises, through an intervening day of work from which the discharged employee was absent, until on the second day thereafter the discharged employee returned to the premises.

II

The Court in its opinion lays stress upon the defendant's failure to object, for variance, to Dodson's evidence that the intestate was discharged two days before the shooting, and not as averred in the declaration, and in substance and effect holds that such failure to object enlarged the plaintiff's pleadings and that accordingly the case comes within the provisions of Sec. 6331 of the Code, but it has failed to note the defendant's motion and exception shown below.

(a) The petition calls attention to the trial court's order entered October 22, 1926 (Rec., pp. 23-4), to the pleadings therein referred to, and to the defendant's exception therein noted, by which it is shown that the petitioner has waived no right, that the averments of the declaration have not been enlarged, and that the plaintiff, when the opportunity offered, did not amend his declaration.

The plaintiff's declaration (Rec., p. 19) distinctly averred that the intestate on the day of the shooting was the defendant's employee and had begun his day's work as its servant at the place where he was employed to work, that he was discharged and after such discharge did not leave the prem-[fol. 191] ises immediately, whereupon the defendant's foreman shot him, and the legal duty averred, the breach of which was complained of, was that of master to servant.

The defendant pleaded not guilty and also filed a special plea (Rec., p. 22) that the defendant and the plaintiff's intestate at the time of the supposed commission of the grievances complained of were engaged and employed in interstate commerce and that the intestate's injury was not inflicted and his death did not result in whole or in part from the negligence of any of the officers, agents or em-

ployees of the defendant; to which special plea the plaintiff filed his replication (Rec., p. 24), alleging that at the time of the happening of the mischief complained of in the declaration the intestate was not in the employment of the defendant and was not engaged in interstate commerce. The defendant moved the court to strike out and reject the replication on the grounds that it was bad for duplicity and that "said replication departs from the plaintiff's case as he has declared it" (Rec., p. 25).

The Court, as appears from its order (Rec., p. 24) overruled the motion to strike out the replication on the ground that it was bad for duplicity and "that it is a departure from the plaintiff's case as he has declared it," and "the defendant thereupon excepted."

Two issues were tried, one the general issue, the other upon the special plea and the replication, under which last replication Dodson's evidence, under said ruling of the Court, duly excepted to, was admissible. Said evidence disproved the averments of the declaration, and upon a demurrer to the evidence entitled the defendant to a judgment in its favor.

It is submitted that said replication did not and could not amend the declaration; that the record shows due exception to the action of the court taken by the defendant; that it has not waived any right and that it is entitled to the benefit of the fundamental rule, sanctioned by repeated decisions of the Court and not altered by statute, that a plaintiff may recover, if at all, only upon the case made by his pleadings.

[fol. 192] (b) By the opinion and judgment of the Court the plaintiff is permitted in the same suit to occupy successive inconsistent positions, and to have judgment on a state of facts negativing the case made by this declaration.

III

It is held by the Court that Dodson had "authority to discharge Bryant, and when he appeared Monday, under the circumstances stated, and was ordered off just as he and another of the gang 'were ready to step on the end of the car,' Dodson had the right to use reasonable force to remove him." It must follow that Bryant, discharged employee, had the correlative right necessarily incident to

the existence of such right in Dodson and his employment, peacefully to leave the master's premises, and, if removed therefrom, to be removed without unreasonable force; which implied right corresponded to and of necessity was co-extensive in time with his superior's said right, after discharging, to require him to leave and to use reasonable force to remove him.

Dodson's right, incident to his exercise of the authority to discharge, is held to relate back to his act of discharging Bryant; the intestate's right likewise and to an equal degree must relate back and be incident to his employment and his discharge therefrom.

The evidence is without conflict and conclusive that the intestate's employment at the time of his supposed discharge on Saturday was exclusively interstate. The federal employer's liability act governs in such case and under it there can be no liability upon the defendant.

IV

There is no evidence in the record that the intestate refused to leave the defendant's premises or that foreman Dodson attempted to remove him. There is uncontradicted evidence that Dodson was not authorized to eject or expel trespassers (Long, Rec., p. 147) and both Long (Rec., p. 146) and Crance, Supervisor of Tracks, testified fully (Rec., p. 141) as to his duties.

[fol. 193] It is respectfully submitted that it was incumbent upon the plaintiff to prove his averment that Dodson shot the intestate in the course and scope of Dodson's employment. There was no evidence that the shooting was a part of the discharge, which discharge the Court holds occurred two days prior thereto, and judgment should not be given for the plaintiff without any evidence to prove such connection. The mere fact that the shooting grew out of the discharge can not impose liability upon the defendant.

V

In its opinion the Court says that it appears that Long, the foreman who appointed Dodson as substitute, knew that Dodson carried a pistol. There is no evidence that

Dodson carried a pistol while he worked with other men, and the only evidence regarding carrying a pistol is that of Long (Rec., pp. 147, 148, 157) that six months before the shooting, during the preceding winter, while Dodson was acting as night watchman at Moore's Tunnel he carried a pistol, Long expressly stating that this was during the preceding winter and "when he was not in charge of any body of men."

VI

The Court holds that when Bryant went to the tool house on Monday morning he did not go there as a trespasser, did not consider the discharge on Saturday as final, and on his way there said he expected that Dodson would discharge him, and that under these circumstances Bryant cannot be said to have been a trespasser in going to the tool house but became such when informed of his prior dismissal and refusal to leave.

Your petitioner shows that under the evidence and the opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law appliable to this case is the federal employer's liability act, under which there can be no recovery except for acts of commission or omission negligently done.

[fol. 194] And your petitioner submits that it has been deprived in this respect of its rights and immunities under the said federal statute.

VII

The defendant under the pleadings and proof in this case had the right to insist and insists that its relations to the intestate were and are governed exclusively by the federal employer's liability act, and that in imposing liability upon it for the death of said intestate it has been and is deprived of its rights and immunities under said federal statutes.

The petitioner asks that the following matters be considered in connection with the first three grounds specified upon which a rehearing is asked.

I

The rule enunciated by the Court that the implied incidental right of a foreman, authorized to discharge an employee, persists for two days after the discharge has been effected, is of grave importance to the petitioner.

In its opinion the Court finds that the actual discharge occurred on Saturday afternoon. Bryant thereafter left the defendant's premises and there is no intimation that he required to be removed. He left making the specific threats to Dodson, "I want to see you when we get to the tool house. I am going to beat the hell out of you," "If you cause me to lose my job I will kill you" (Rec., p. 88), but Dodson did not accompany him, and thus in all probability avoided the very occurrence which took place the following Monday.

The discharge had been effected and the discharged employee had left the premises, and nothing could require the exercise then or the incidental right to remove Bryant from the premises. Bryant did not appear at the work during Sunday, but again came on the premises Monday.

In the case of Rogahn v. Moore Mfg. Co. (Wis.), 48 N. W. [fol. 195] 669, to which the Court refers as bearing a striking resemblance to the instant case, the foreman discharged Rogahn and directed him to leave the shop at once, and when Rogahn replied that he would do so as soon as he got ready, the foreman, to hasten plaintiff out of the shop, assaulted and struck him and caused him to fall. The order to leave the premises and the foreman's assault were in immediate sequence. They constituted a single transaction. There was no interval of two days' time as in the present case. In this most important respect the cases are entirely dissimilar.

Even in cases involving a carrier and its passengers, the lapse of a clear interval of time between the act done in the discharge of his duty and the servant's subsequent assault upon the passenger is held conclusively to exonerate the carrier from liability.

Central R. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425;

Zeccardi v. Yonkers R. Co., 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770;

McGilvray v. West End St. R. Co., 164 Mass. 122, 41 N. E. 116;
McQuerry v. Metropolitan St. R. Co., 117 Mo. App. 255, 92 S. W. 912.

There is an entire absence of evidence here that the foreman had the authority to eject a discharged employee from the master's premises, either expressly given him by the master or of usage or custom to that effect. It is only by legal implication that the right to require the employee to leave the premises exists as incident to the authority to discharge, for which reason, if for no other, it must be in continuous sequence to the authorized act.

It is submitted that since the authority to discharge was exercised Saturday and the intestate then left the defendant's premises, the right again on Monday to require the intestate to leave could not exist as incident to his employment. If this right could again spring into existence on Monday, two days afterwards, when Bryant appeared on [fol. 196] the premises, there is no limit to its duration and Dodson, without the defendant's authority or interposition, is constituted guardian of its premises.

II

Although his declaration averred the breach of a duty of master to servant, that the intestate was on the defendant's premises as an employee and in the defendant's employment immediately preceding the shooting, and that he was shot when he did not leave the premises immediately after his discharge, the evidence of Dodson was that the intestate was discharged two days before the shooting—which evidence, if taken to be true, precluded the plaintiff's recovery upon the case made by his declaration.

That this evidence was introduced by the plaintiff without objection by the deefndant on the ground of variance, whereby the plaintiff could have had an opportunity to amend his declaration, in the opinion of the Court enlarged the plaintiff's pleadings and permits him to recover under the provisions of Sec. 6331 of the Code, on a case not made by his declaration.

But it appears from the record and the exception then taken by the defendant to the ruling of the Court on its

motion to strike out the replication to its special plea that the defendant could not have objected to the evidence because of such variance that such objection would be mere repetition of an objection already expressly made and overruled, and that the plaintiff, at the time of the objection actually made, could have amended and did not do so.

The plaintiff's replication to the special plea made the issue that "at the time of the happening of the mischief in the declaration complained of and the said plaintiff's intestate was not, as in the defendant's special plea alleged, in the employment of the defendant." The Court had ruled that this replication did not depart from the case averred in the declaration, although, in the opinion of counsel for the defendant, it was absolutely inconsistent with that case [fol. 197] and negatived it completely. The defendant excepted to the trial court's ruling. The evidence referred to by the Court in its opinion, that the plaintiff's intestate had been discharged on the Saturday preceding the happening of the mischief in the declaration complained of, clearly supported the plaintiff's replication, and was admissible, if the trial court's ruling was correct. No objection made by the defendant on the ground of variance would have been sustained. The defendant was not required to repeat its objection already made and overruled, in order to preserve its rights. In not going through the idle formality of presenting its objection when the evidence was introduced and excepting to the court's refusal to exclude it, the defendant did not waive its objection and should not now be prejudiced in a matter in which it had no possible option.

It is submitted that to permit the pleadings to be enlarged by this evidence, so as to be a clear negation of and entirely inconsistent with the plaintiff's case as made by his declaration, is in contravention of two fundamental rules, sanctioned by repeated decisions of the Court, namely:

The plaintiff cannot allege one set of facts in his declaration and recover upon proof of an entirely different set of facts. The plaintiff may recover, if at all, only upon his case as pleaded.

Norfolk, etc., R. Co. v. Warden, 117 Va. 801, 804;
Atlantic, etc., R. Co. v. Caple, 110 Va. 514, 517.

A party is forbidden to assume successive positions in the course of a suit, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory.

Wessel Duval & Co. v. Crozet C. Co., 143 Va. 469, 473;
Alexander v. Comth., 137 Va. 477, 484;
Canada v. Beasley & Bros., 132 Va. 166, 174.

[fol. 198] III

If Dodson was acting within the scope of his implied incidental authority to require Bryant, without the use of undue force, to leave the master's premises, Bryant then had the indubitable correlative right to leave the premises, safe from violence.

If Dodson's implied incidental right related back to his exercise on Saturday of the power to discharge—and it must so relate back, or it could not be incidental thereto—Bryant's right likewise related back to his employment and his discharge therefrom.

The right of an employee to leave his master's premises with reasonable safety is a necessary incident of his day's work or of his discharge from his employment, as the case may be, and the law governing his exercise of that right is the same law which governs his employment.

It is proved, without conflict, that Bryant's employment on Saturday was interstate, just as it is proved and conceded that the work to be done on Monday was interstate.

Under such circumstances the state law cannot apply and the case is controlled exclusively by the federal employer's act, under which there can be no recovery.

For the reasons asigned, therefore, your petitioner respectfully prays that the judgment and decision above complained of may be reheard and reviewed, and judgment given as may be just and right in the premises.

And it will ever pray, etc.

The Chesapeake & Ohio Railway Company, by Its Attorney. J. M. Perry, Attorney for Petitioner.

[fol. 199] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

MINUTE ENTRY—Jan. 30, 1928

This day came the plaintiff in error, by counsel, and moved the court to set aside the judgment entered herein on the 19th day of January, 1928, and grant a rehearing; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy. Teste: H. Stewart Jones, C. C.

[fol. 200] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

ORDER DENYING REHEARING—Mar. 28, 1928

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 19th day of January, 1928, and grant a rehearing thereof, the prayer of said petition is denied.

A Copy. Teste: H. Stewart Jones, C. C.

[fol. 201] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

ORDER SETTING ASIDE ORDER DENYING REHEARING—Mar. 29, 1928

On further consideration of the petition to rehear in this case which was denied on the 28th day of March, 1928, it is ordered that the said order and judgment be set aside and annulled, and the court takes further time to consider the same.

Which is ordered to be certified to the clerk of this Court at Staunton.

A Copy. Teste: H. Stewart Jones, C. C.
A Copy. Teste: H. H. Wayt, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.

[fols. 202 & 203] In Supreme Court of Appeals of Virginia, in Wytheville

[Title omitted]

Order Granting Rehearing—June 25, 1928

The Court having maturely considered the petition of the Plaintiff in Error to rehear the judgment of this Court in this cause entered on the 19th day of January, 1928, is of opinion that it should be granted. It is therefore adjudged and ordered that the judgment aforesaid be, and it is hereby set aside and that this cause be reinstated upon the privileged docket of this Court at its place of session at Staunton for a rehearing thereof.

Which is ordered to be certified to the clerk of this Court at Richmond and to the Clerk of this Court at Staunton.

A Copy. Teste: J. M. Kelly, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.

[fol. 204] In Supreme Court of Appeals of Virginia, in Staunton

[Title omitted]

Order Transferring Cause—Sept. 12, 1928

It is ordered that this cause which is pending here be forthwith transferred to the docket of this Court at Richmond, there to be heard and determined, and with that view it is ordered that the Clerk of this Court here transmit the records and papers of said cause to the Clerk of this

Court at Richmond. It is further ordered that a copy of this order be forthwith certified to the Clerk of this Court at Richmond.

A Copy. Teste: H. H. Wayt, Clerk.

A Copy. Teste: H. H. Wayt, Clerk.

[fol. 205] Minute entry of argument and submission March 13, 1929, omitted in printing.

[fol. 206] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

JUDGMENT—Mar. 21, 1929

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, and being equally divided in opinion as to the judgment to be entered in the premises, it is considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defense herein.

Certificate to foregoing paper omitted in printing.

[fols. 207 & 208] Clerk's certificate to foregoing transcript and of no opinion omitted in printing.

[fols. 209 & 210] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

Endorsed on cover: File No.—. Virginia Supreme Court of Appeals. Term No. —. The Chesapeake & Ohio Railway Company, petitioner, vs. R. L. Bryant, administrator of the estate of M. L. Bryant, deceased. Petition for writ of certiorari and exhibit thereto. Filed —— —, 19--. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1929

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Supreme Court of the United States, October Term, 192–. Order granting petition for certiorari.